82-235

In the

Supreme Court of the United States

October Term, 1982

No._____

G. PATRICK MORRIS, et al,

Petitioners,

vs.

UNITED STATES OF AMERICA and JAMES G. WATT, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

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QUESTIONS PRESENTED

1. Whether the administrative complaints conferred jurisdiction for cancellation of the entries.

2. Whether the courts below had jurisdiction to decide the assignment issue.

3. Whether the Court of Appeals had jurisdiction of the first appeal and, it it did, the extent of that jurisdiction.

4. Whether the leases and mortgages violated the holding limitation of 43 U.S.C. § 329.

5. Whether violation of the holding limitation of § 329 is ground for cancellation of the entries.

6. Whether the IBLA's interpretation of 43 U.S.C. § 329 can be applied to these entries.

7. Whether the IBLA's decision is supported by substantial evidence.

8. Whether the District Court erred by denying the petitioners' motion for leave to amend the complaint.

9. Whether 43 U.S.C. § 329, as applied, is unconstitutionally vague.

10. Whether the petitioners' rights of due process were violated by the actions of either the IBLA or the courts below.*

*The parties not listed in the caption are Milo Axelsen, Peggy M. Axelsen, Charlene S. Baltzor, George R. Baltzor, Juanita M. Morris, Elise L. Neeley, Vera M. Baltzor, Joan E. Roth, Lyle D. Roth, and Farm Development Corporation, an Idaho corporation, of which Sailor Creek Water Company is a wholly owned operating division. John E. Morris, an entryman who was a party in the administrative proceedings, and Nellie Mae Morris, an entrywoman who was a party in the administrative and judicial proceedings, have died, and their entries have been devised to G. Patrick Morris.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered herein on November 16, 1978, as amended on April 9, 1979, and the judgment and decisions of that Court entered on March 5, 1982 and April 16, 1982.

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OPINIONS BELOW

The opinions of the District Court (Apps. D and F, infra, are not reported. The first opinion of the Court of Appeals (App. D, infra) is reported at 593 F. 2d 851. The second opinion of the Court of Appeals (App. C, infra) was issued as a Memorandum and will not be reported.

JURISDICTION

The judgment of the court below (App. C, infra) was entered on March 5, 1982. A timely petition for rehearing was denied on April 16, 1982. On July 7, 1982, Justice Rehnquist entered an order of this Court extending the time for filing a petition for a writ of certiorari in this cause to August 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and regulations: U.S. Const., Amend. V; U.S.C. § 552, 5 U.S.C. § 554, 5 U.S.C. § 554(b)(3), 5U.S.C. § 556(d), 5 U.S.C. § 557(c), 5 U.S.C. § 558(b), 43 U.S.C. § 321, 43 U.S.C. § 324, 43 U.S.C. § 329, 43 U.S.C. § 1201, 43 U.S.C. § 232.18(a) and (d) (1963), 43 C.F.R. § 1852.1-1(a)(4) (1966), 43 C.F.R. § 1852.2-2 (1966), 43 C.F.R. § 2[illegible]6.1-1(c)(3) (1964), and 43 C.F.R. § 2521.3(c)(3) (1981).

STATEMENT OF THE CASE

In 1963 twelve qualified citizens of the United States (the entrymen) filed applications for entries on 3,781.62 acres of land in Idaho, under the Desert Land Act, 43 U.S.C. § 321, et. seq., Act of March 3, 1877, 19

Stat. 377, as amended. The regulations of the Department of the Interior (Department) in effect at that time permitted mortgages on desert entries,[1] but did not define the word "hold" as used in 43 U.S.C. § 329, did not mention leases, did not require the entryman to be personally involved in the cultivation and irrigation of the land, or state that settlement was involved in the holding limitation of § 329. A representative of the entrymen advised the Bureau of Land Management (BLM) that several of the entries would be leased to a single operator for farming.

The entrymen contracted with Sailor Creek Water Company (Sailor Creek) for construction of a main irrigation system and purchase of water rights, with payment secured by mortgages on the entries. Those contracts, with copies of the mortgages attached, were submitted to the BLM as part of the application procedure. In August of 1963 the BLM approved Sailor Creek as source of water, and between November of 1963 and March of 1964 the BLM approved the applications and "allowed" the entries.

In late September of 1963 eleven entrymen leased their entries to the twelfth entryman (Morris) and Allen Noble, for two years, with two five-year renewals, on a cash rent basis. The leases were discussed with BLM representatives before they were made. As each entry was allowed, the lease for that entry was recorded in the county records. Early in 1964 Morris and Noble subleased for one year to Sailor Creek, and Morris leased his to Sailor Creek for 1964.

[1] 43 C.F.R. § 232.18(d).

In June of 1964 the entrymen submitted final proof and made final payment as required by 43 U.S.C. § 329. The BLM field report on final proof noted that the entries were being farmed by Sailor Creek under contract with the entrymen. About a month after final proof the BLM requested the entrymen to furnish copies of their contractual arrangements, noting that "there is nothing of record with this office that shows such contractual arrangements."[2] The requested copies were furnished approximately two weeks later.

In September of 1964, after being informed of a decision made in the Indian Hill case (Note 4, infra) by the Director of the BLM in August of 1964, which held that the holding limitation of 43 U.S.C. § 329 applied only to the holdings of entrymen, and did not apply to mortgagees or lessees, Morris assigned his interest in the eleven leases to Sailor Creek, and leased his entry to Sailor Creek for 1965 with two five-year renewals. Noble assigned his interest in the leases to Sailor Creek in February of 1965.

In April of 1965 the Secretary of the Interior (Secretary) issued an order[3] setting aside the BLM Director's 1964 decision, based on an opinion rendered by the Solicitor of the Department on April 5, 1965.[4] The BLM did not notify the entrymen that the new interpretation of § 329 would be applied to their entries, and did not order them to cancel the leases and mortgages.

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[2] Administrative Record (AR), Exhibit G-2, Doc. 33.

[3] 72 Interior Decisions 182-183. Volumes 1 through 52 of the decisions of the Department of the Interior are cited ___ L.D. ___; Volume 53 and all subsequent volumes are cited ___I.D.___

[4] 72 I.D. 156.

In May of 1966 the BLM filed administrative complaints against the entries. The charges were stated as conclusions of law, instead of the statements of the facts relied upon required by the Department's pleading regulations.[5] There was no charge that the mortgages and leases resulted in holding by Sailor Creek. The entrymen's requests for clarification of the charges were denied. The notice of hearing did not state the matters of fact and law asserted as required by 5 U.S.C. § 554(b)(3) and 43 C.F.R. § 1852.3-2 (1966).

After a 38-day hearing the Administrative Law Judge (ALJ) issued a decision[6] in favor of the entrymen on all charges and directed issuance of patents. He expressly found that the entrymen acted in good faith. The Government appealed that decision to the Interior Board of Land Appeals (IBLA).

While the appeals to the IBLA were pending, the Department acquiesced in a decision which upheld two desert land entries aggregating 600 acres which had been developed by a partnership under leases permitting the tenants to "have and hold" the land for five years, with the tenants constructing and paying for the irrigation system and paying for all farming operations and receiving all crop income from the land.[7] The ALJ in that case rejected the BLM's contention that the lease arrangements constituted assignments of the entries and that the tenants held more than 320 acres of desert land prior to issuance of patent in violation of § 329.

[5] 82 I.D. at 147, App. M, at M-8; 43 C.F.R. § 1852.1-4(a)(4) (1966 Revision).

[6] Appendix D, p. D-1, Decision, dated January 29, 1971.

[7] *Waymon D. Yarbrough*, Idaho 07212, *Wells Hepworth*, Idaho 07289, February 15, 1972.

In 1975 the IBLA issued its decision on these entries, ruling that Sailor Creek, through the leases and mortgages, held more than 320 acres of desert land and that, because it found the BLM had no knowledge of the "totality of the arrangements" until it "required" copies of the contractual arrangements, the Government was not estopped from applying its 1966 interpretation of 43 U.S.C. § 329 to these entries. The only evidence considered by the IBLA on the knowledge issued was the letter from the BLM (Note 2, supra), which was admitted over objections of hearsay, irrelevance and incompetence.[8]

The IBLA did not explain or distinguish the ALJ's finding that the BLM knew in 1963 that the entrymen intended to obtain 100% financing and to lease the entries to a single farming entity. The IBLA did not reverse the ALJ's determination that the transactions did not constitute assignments of the entries, nor did it disturb his finding that the entrymen acted in good faith.

The IBLA ordered rejection of the final proofs and cancellation of the entries, without affording the entrymen any opportunity to comply with the new interpretation of § 329, and without any explanation of its abrupt departure from the Department's long standing policy of giving only prospective operation to changes in interpretation of the Desert Land Act or any explanation why the interpretation must be applied retroactively.

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[8]Tr. of Pre-hrg. Conf., at 22.

The entrymen filed an action in the United States District Court for the District of Idaho to have the IBLA's decision set aside and to compel the Secretary to issue patents on the entries. The action was against the United States and the Secretary (collectively, the Government). The issues raised by the complaint included erroneous interpretation of the statutes, failure to comply with the publication requirements of 5 U.S.C. § 552, the pleading regulations of the Department, and the notice requirement of 5 U.S.C. § 554, violation of the holding limitation was not grounds for forfeiture of an entry, the IBLA decision was not suppoted by substantial evidence nor warranted by the facts, estoppel from retroactively applying the 1966 interpretation to these entries and estoppel by failure to afford the entrymen an opportunity to rescind arrangements claimed to be illegal, deprival of the use and benefit of the irrigation system and water rights without due process, violation of the entrymen's rights to due process, and finally, that the entries were contracts controlled by the law in effect at the time they were made, which should be construed most strictly against the Government as the party who drafted those contracts. The complaints sought damages against the Government, as well as issuance of patents. The District Court had jurisdiction under 28 U.S.C. §§ 1361 and 1331.

Both sides moved for summary judgment. The government's motion was stated in broad terms, but its supporting memorandum stated the questions presented to be whether (1) the IBLA's findings of fact were supported by substantial evidence, (2) the

IBLA's interpretation of the holding prohibition of 43 U.S.C. § 329 had a rational basis, and (3) the Government was estopped from cancelling the entries.

The District Court, without discussing the legislative history of § 329, ruled that the IBLA's interpretation was not without any rational basis and was entitled to great weight, and affirmed that interpretation. The District Court, after adopting the ALJ's findings of fact as being "correctly found *** based upon the evidence,"[9] ruled that the cancellation was an abuse of discretion and that the IBLA was estopped from enforcing forfeiture of the entries without any opportunity to the entrymen, who were admittedly acting in good faith, to equitably redeem themselves from the change in policy which occurred long after final proof. The District Court also held that the IBLA's decision violated the spirit and intent of 5 U.S.C. § 552.

The District Court characterized the transactions as "assignments" of the entries and applied the policy of a decision and a regulation of the Department[10] in holding that the "assignments" which had been submitted to the BLM could not be recognized on account of disqualification of the assignee, and disallowed the assignments and held that title would be considered as retained in the entrymen. The judgment of the District Court was that the entrymen were allowed until May 1, 1977 to divest themselves of the "disqualifying assignments" and that patents would be issued

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[9] Appendix F, at F-2.

[10] *Freeman v. Larson*, 48 L.D. 519 (1922); 43 C.F.R. 2226.1-2(c)(3) (1964).

upon proof of divestiture, otherwise the IBLA's decision would be affirmed.

The Memorandum of the District Court[11] did not discuss any other issues, and it did not make any ruling on the claim for damages.

Before the District Court ruled on the divestiture documents filed by the entrymen the Government appealed to the United States Court of Appeals for the Ninth Circuit. The entrymen cross-appealed. Neither party raised the issue of whether the IBLA's finding on the knowledge element of estoppel was controlling over the ALJ's contrary finding. The Ninth Circuit reversed, [12] holding that (1) the interests of the entrymen had not vested because the patents had not actually issued, (2) the transactions were assignments under 43 U.S.C. § 324, (3) the IBLA's decision was consistent with the Secretary's 1966 decision in *Indian Hill*, supra, (4) the IBLA's finding that the Government did not have knowledge of the transactions was controlling over the ALJ's findings, (5) the IBLA was not estopped from applying the change in interpretation because the knowledge element of estoppel was not satisfied, (6) compliance with 5 U.S.C. § 552 was not required because of the Government's lack of knowledge of the transactions, (7) the District Court exceeded its powers in ordering that patents must issue upon proof of divestiture, and (8) the IBLA's decision must be affirmed. A petition for rehearing was denied. The entrymen's petition for a

[11] Appendix F.

[12] 593 F. 2d 851 (9th Cir., 1978), App. A.

writ of certiorari was denied by this court.[13] In that petition the entrymen contended that several issues, including the contract theory, the constitutional issues and the defective pleading issue had not been determined and remained open for determination by the District Court.

After the mandate went down to the District Court, the entrymen moved for leave to amend the complaint by adding eleven additional counts including the equal protection element of due process, the insufficient notice element of due process, violation of 5 U.S.C. § 557(c), and violation of due process for failure to rule upon all issues, lack of jurisdiction to cancel the entries for violation of the holding limitation, lack of subject matter jurisdiction by reason of insufficient notice, violation of the right of due process because the statute, as applied, was unconstitutionally vague, violation of due process by reason of impermissible prejudice, denial of due process by reason of combination of policy-making, prosecutorial and administrative functions in the administrative proceedings, laches, and waiver of the right to cancel the entries by acceptance of full payment of the purchase price and by other conduct. The District Court held that all issues in the case had been decided by the judgment of the Ninth Circuit, denied the motion for leave to amend, and entered an order dismissing the action and the complaint. The entrymen moved for an order amending the findings, conclusions and judgment, contending, among other things, that the Court

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[13] 444 U.S. 863, 62 L. Ed. 2d 86, 100 S. Ct. 133 (1979).

of Appeals had no jurisdiction to consider the appeal, because the 1976 judgment of the District Court was not a final judgment because the District Court had retained jurisdiction to rule on the divestiture documents filed by the entrymen, there was no ruling on the damage claims and on other issues, and there was no certification under Rule 54(b), F.R.Civ. P. The entrymen also contended that the intention of the parties controlled interpretation of the contracts created by the entries. The motion was denied and the entrymen again appealed to the Ninth Circuit.

On the second appeal the Ninth Circuit held that all issues had been decided on the first appeal and affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

This case raises important questions of jurisdiction, statutory interpretation, administrative and judicial procedure, and due process. The opinions of the IBLA and of the courts below in this case are in direct conflict with many decisions of this Court and other courts of appeals. Many issues are involved, but perhaps the most important is whether a new interpretation of a 72-year-old statute can be applied retroactively to amend the contracts and enforce forfeitures against the parcels of land developed at a cost in excess of $700,000.00 and having a present probable value of more than five million dollars, without notice or an opportunity to comply with the new interpretation. We first address the jurisdictional issues.

The administrative charges failed to provide adequate notice of the matters of fact and law asserted, and were insufficient to confer jurisdiction of the administrative proceedings. The jurisdictional defect invalidated the administrative action and the decision of the IBLA was void.[14] The action is further invalidated by the BLM's failure to summarily dismiss the complaints as required by its own regulation, 43 C.F.R. § 1852.1-5(a) (1966).

The Court of Appeals did not have jurisdiction of the first appeal (Morris I) because in its 1976 judgment the District Court (1) reserved jurisdiction to rule on the adequacy of the divestiture documents, (2) did not rule on the damage claims, and (3) made no certification under Rule 54(b). The judgment was not final and the Court of Appeals had no jurisdiction to hear the appeal and was without authority to decide the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). On these grounds the judgments of the Ninth Circuit should be vacated, and the case should be remanded with instructions to recall and vacate the judgment in Morris I and to dismiss the first appeal for want of jurisdiction. Id., at 379-380.

The 1976 judgment of the District Court did not direct the immediate delivery of patents for conveyance of legal title, it did not effect a change in possession or right of possession adversely to the Government, and it did not require the immediate payment of money. The judgment in Morris I was not within the

[14] *Cf., North Alabama Express, Inc.*, v. *United States*, 585 F. 2d 783, 786 (5th Cir., 1978).

exception established in *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1948), which was the basis for the decision in *Sekaquaptewa* v. *MacDonald*, 575 F. 2d 239, relied on by the Ninth Circuit in the second appeal (Morris II).

Even if the Ninth Circuit had jurisdiction in Morris I, that jurisdiction was limited to the estoppel and 5 U.S.C. § 552 issues that had been decided by the District Court. The *Forgay* exception to the finality requirement of 28 U.S.C. § 1291 is no broader than the "collateral order" exception established in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). See *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977). Only those issues decided adversely to the Government were brought before the Court by the Government's appeal in Morris I.[15] The entrymen did not raise, and were not required to raise, other issues in their cross appeal in Morris I,[16] and probably could not have raised other issues because, having consented to the 1976 judgment by filing the divestiture documents, they agreed to that judgment, so long as it remained in existence. *Cf., Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648, 649 (1977).

When the Ninth Circuit decided the estoppel and § 552 issues in favor of the Government in Morris I, the only grounds necessary for reversal were established[17] and the Court's duty was to remand for fur-

[15] See, e.g., *Ex Parte French*, 91 U.S. 423 (1875); *Loudon* v. *Taxing District of Shelby County*, 104 U.S. 771, 774 (1882); *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484, 487 (1934).

[16] *Century Investment Corporation* v. *United States*, 277 F. 2d 247, 251 (9th Cir., 1960).

[17] *See Barker Painting Co.* v. *Local No 734, Brotherhood of Painters, Decorators, and Paperhangers of America, et al.*, 281 U.S. 462 (1930).

ther proceedings, such action being essential to protect the entrymen and preserve their right to urge grounds that were not disposed of by the District Court's 1976 judgment.[18]

The effect of the judgment in Morris I, as interpreted by the courts below, was to grant summary judgment in favor of the Government on grounds that the Government had not raised by its motion for summary judgment, and that had not been considered by the District Court. The judgment in Morris I thus deprived the entrymen of the opportunity to dispute facts material to the other issues raised by the complaint or to present legal arguments on issues not considered by the District Court, and it clearly was error for the Ninth Circuit to do so. *Fountain* v. *Filson*, 336 U.S. 681, 682-683 (1949). In their petition for rehearing in Morris I the entrymen stated that the case should be remanded for consideration of certain other issues.

The courts below did not have jurisdiction to determine that the transactions constituted assignments of the entries.[19] The IBLA did not disturb the ALJ's ruling that the transactions did not constitute assignments and there was no case or controversy regarding assignments and no jurisdiction existed to interpret or apply 43 U.S.C. § 324. *Cf., Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264,

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[18] *Cf., Neely* v. *Eby Construction Co.*, 386 U.S. 317, 325-326 (1977); *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364, 398-400 (1913).

[19] The Ninth Circuit also ruled that the assignments violated 43 U.S.C. § 324 App. A at A-3. Its statement (id.) that the IBLA held that the arrangements violated § 324 was patently erroneous.

294; n. 36 (1981). The IBLA's action must be measured against 43 U.S.C. § 329, under which the action was taken, and not against 43 U.S.C. § 324. *Cf., American Textile Institute* v. *Donovan*, 452 U.S. 490, 540 (1981).

In any event the courts below were wrong in holding that the mortgages and leases amounted to assignments of the entries. The decisions and regulations of the Department clearly recognize that an assignment of a desert land entry is a transfer of the entire interest of the assignor, by which the assignee succeeds to all rights of the original entryman.[20] The cited regulation states that when the BLM recognizes the assignee, he "takes the place of the assignor as effectively as though he had made the entry." It was error for the courts below to disregard the regulation, *INS* v. *Wang*, 450 U.S. 139, 143 (1981), and to hold that the transactions were assignments.

The regulations of the Department require that contest complaints contain a statement of the facts relied on[21] and that the notice of hearing (in obedience to 5 U.S.C. § 554) contain a statement of the matters of fact and law asserted.[22] The administrative complaints did not state that the mortgages and leases, in combination, constituted a holding under 43 U.S.C. § 329, or that the activities of Sailor Creek constituted such possession and control and the receipt of such benefits as to constitute a holding under § 329. The

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[20] *Albert A. Bandy*, 41 L.D. 82 (1912); *Wallace S. Bingham*, 82 I.D. 377 (1975), 43 C.F.R. § 2521.3(c)(3) (1981 Revision).

[21] C.F.R. § 1852.1-4(a)(4) (1966).

[22] 43 C.F.R. § 1852. 3-3 (1966).

notice of hearing did not state those facts, nor did it state that the Deparment was asserting as a matter of law that possession, control and receipt of benefits under mortgages and leases could constitute a holding under § 329 or that the new interpretation of § 329 constituted failure to comply with the requirements of law so as to be grounds for forfeiture of the entries.

The Department is required to follow its procedural regulations, even though the procedure provided may be generous beyond the requirements that bind the Department.[23] The Department's failure to comply with its pleading regulations deprived the entrymen of their right "***to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."[24]

The procedure followed by the Department deprived the entrymen of a fair and adequate hearing because the standards to be applied were neither evolved nor announced until issuance of the decision holding that those standards had been violated. *Cf., Hill* v. *Federal Power Commission*, 355 F. 2d 355 (5th Cir., 1964). The necessity for evidence on the elements of possession, control and receipt of benefits characterized by the IBLA as constituting a holding of desert land was not at all apparent from the complaints or from the notice of hearing, nor was it apparent that evidence was necessary on the question of the propriety of retroactive application of a new interpretation of § 329. The deci-

[23] *Vitarelli* v. *Seaton*, 359 U.S. 535, 540-546 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957).

[24] *Morgan* v. *United States*, 304 U.S. 1, 18, 19 (1938); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 105 (1963).

sion of the IBLA should be set aside by reason of the failure to comply with the procedural regulations and 5 U.S.C. § 554.

It was error for the courts below to defer to the IBLA's interpretation of 43 U.S.C. § 329, because it was not made contemporaneously with the enactment of the statute, was inconsistent with other decisions, and was contrary to the legislative history.[25] In 1894 the Secretary referred to the holding limitation as relating "simply to the quantity of lands which one person could thereafter enter" and as amending "the act of 1877 as to the quantity of land that could be entered by any one person or association of persons." *Robert B. Gardinier,* 19 L.D. 83, 85. In 1895 this Court referred to the holding limitation as the "provision relating to the quantity of desert lands that any person or association of persons might appropriate." *United States* v. *Healey,* 160 U.S. 136, 148-149. In 1891 the Department held in *Bond's Heirs* v. *Deming Townsite,* 13 L.D. 665, 667, that the Desert Land Act was not a settlement law and that all the work of improvement could be accomplished by an agent instead of by the entryman. The Department held in 1899 that exceeding the holding limitation of § 329 did not warrant cancellation of an entry.[26] In *Williams* v. *Kirk,* 38 L.D. 429 (1910), the Department held that financial assistance could be rendered, so long as it was not used to obtain an agreement to transfer title. Contemporaneously with these entries the Department held in 1964 that development and farming con-

[25] *Andrus* v. *Shell Oil Co.,* 446 U.S. 657, 667-668 (1980).

[26] *Heinzman* v. *LeTroadec's Heirs,* 28 L.D. 497.

tracts that did not amount to agreements to transfer title did not violate § 329.[27]

In August of 1964, after these entries had been fully developed and proof and payment had been made, the BLM ruled that the development leases and mortgages used in the Indian Hill project did not violate § 329, and that only the holdings of entrymen, not those of mortgagees or lessees, were covered by § 329. In this case the IBLA recognized that Sailor Creek did not acquire the leases until 1965. 82 I.D. 146, at 150-151, App. E, at E-9, E-10.

This Court has held that to hold land a person must have some form of title to that land. The proposition is stated in *Harden* v. *Fisher*, 14 U.S. (1 Wheat.) 300, 301:

> "***To avail themselves of this treaty, the lessors of the plaintiff below must show that their ancestors held the lands for which this suit was instituted at the time when it was made. The court does not mean to say that they must show a seizin in fact, or an actual possession of the land, but that the title was in him at the time.***"

Orr v. *Hodgson*, 17 U.S. (4 Wheat.) 453 (1819), also recognizes and holds that in order to hold land it is essential to have some interest in the title to the land. Id., at 464. *Bright's Lessee* v. *Rochester*, 20 U.S. (7 Wheat.) 535 (1822), held that the existence of title was essential to holding land, id., at 545, that the title of the lessee is the title of the lessor, that the lessee holds

[27] *Glenn W. and Margie R. Jensen*, A-29887.

by virtue of the lessor's title and rests upon it to maintain his possession, and that the lessee has no independent right in himself. Id., at 547. These principles were confirmed eight years before the enactment of § 329 in *Robertson* v. *Pickerell*, 109 U.S. 608, 614-615 (1883), and it should be presumed that Congress had these principles in mind when it used the word "hold" in § 329.[28]

The leases created no title interest and did not amount to holding by Sailor Creek. The mortgages of the "anticipated title(s)" (App. A, at A-2) did not create the title interests that would create holdings by Sailor Creek. The interest created by the mortgages was for security purposes only and was not beneficial in nature, thus the entire beneficial interest remained in the entrymen. *Cf., S.R.A.* v. *Minnesota*, 327 U.S. 558, 570 (1946).

The holding limitation did not exist prior to the enactment of § 329 in 1891. Leases and mortgages thus unquestionably were permitted prior to 1891, and the question is whether Congress intended the holding limitation to amend the Desert Land Act so as to prohibit leases and mortgages. It is not sufficient that the transactions came within the dictionary definition of "hold", or that exceeding the holding limitation came within the dictionary definition of "failure to comply with the requirements of the law." The word and the phrase also must be the type of transaction that Congress intended to prevent.[29]

[28] See, e.g., *The Abbotsford*, 98 U.S. 440, 444 (1879); *Kepner* v. *United States*, 195 U.S. 100, 124 (1904); *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978).

[29] E.g., *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 611, (1978); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459, 460, 463 (1892); *Watt* v. *Alaska*, 451 U.S. 259 (1981).

The IBLA held that "hold" has no fixed definition. App. E, at E-11. Even if the word was not itself ambiguous, the addition of the phrase "by assignment or otherwise" makes it ambiguous. The IBLA's interpretation eliminated that ambiguity by simply eliminating the qualifying phrase and determining that a holding of any kind whatsoever violates § 329. The most logical explanation is that in the preceding clause of § 329 Congress authorized issuance of patents to the assignees of original entrymen, and its purpose was to make clear that it did not want anyone acquiring title from the Government to more than 320 acres, whether by original entry or by assignment or through an agreement to convey title after receiving patent or any equivalent transaction.[30]

Nowhere in the history of the Desert Land Act or in the legislative history of § 329 does there appear any discussion of leases. Concern about mortgages was expressed in 1888, but the amendment then under discussion was not enacted. The committee report on § 329 indicated only a purpose to prevent speculative accumulations and to require actual reclamation of the land. 22 Cong. Rec. 3613 (1891). Speculative accumulations referred to obtaining assignments of large areas, which were retained in hopes that the price would go up so that the entries could be reassigned to other parties at an increased price. Both leases, and mortgages to secure repayment of funds borrowed for development, assist in actual reclama-

[30] This interpretation avoids the constitutional vagueness question. *Lorillard* v. *Pons*, 434 U.S. 575, 577.

tion, and enhance, rather than impede, the purposes of § 329.

The 1891 debate expressed concern only about the limitation on the right to assign entries, to which the sponsors responded "There is provision for assignment, but not to an amount more than 320 acres" and "It is impossible for any one citizen to acquire more than 320 acres of cultivable lands." 22 Cong. Rec. 3614 (1891). Congress' understanding of *hold* was indicated in a remark by one of the sponsors of § 329, when he referred to a proposition in a previous Congress that would have given "the holder of a desert-land claim the right to mortgage his land to secure money to reclaim or improve it." 22 Cong. Rec. 3616 (1891). The indication is that the entryman is the holder of the claim.

The lack of any reference to leases, coupled with the failure of the officials charged with enforcement of the law to issue any regulations or decisions indicating that leases were included in the holding limitation, indicates that Congress did not intend the holding limitation to cover leases. If such transactions are regarded as contrary to current public policy, that is a matter for Congress, and not the IBLA, to cure by appropriate legislation.

Under the IBLA's interpretation, actual possession is an essential element of holding land. 82 I.D. at 151-152. In other cases the IBLA has recognized the well established principle that possession by a tenant is in law possession by his landlord. *Minnie E. Wharton, et al*, 79 I.D. 6, 12 (1972), citing *Catholic Bishop* v.

Gibbon, 158 U.S. 170 (1895). In *Alaska Placer Co.*, 84 I.D. 990 (1977), interpreting a mining law involving a holding requirement, the IBLA unequivocally held that possession by a tenant of a public land claimant is in law the claimant's possession and that the claimant may avail himself of the benefits of that possession. Id., at 999-1001.[31]

The IBLA's interpretation is in direct conflict with decisions of this Court made before the holding limitation was enacted. *Catholic Bishop* v. *Gibbon*, supra, indicated that in order to hold land, there "must be an occupancy in one's own right, and not under and dependent upon another." 158 U.S. at 168. *Rector* v. *Gibbon*, 111 U.S. 276 (1884), recognized that the tenant of a claimant under a public land law holds the property for the claimant, id., at 284, and that permissive occupation under the claimant, as tenant or otherwise, does not impair the rights of the claimant, id., at 287.

Congress presumably was aware of this Court's rulings regarding possession of public lands, and had it intended to limit the quantity of land that could be leased to a single tenant, it would have done so in more explicit and appropriate language. It also is presumed that Congress, if it intended possession to be an element of the holding limitation, adopted this Court's previous interpretations and intended that possession by a tenant would be in law possession by the entryman, thus restricting the holding limitation

[31]Two of the judges who decided *Alaska Placer Company* were on the panel that decided this case.

to holdings by the entryman. If it did not so intend, the statute is unconstitutionally vague.

It was error for the Ninth Circuit to rule in Morris I that interests of the entrymen had not vested. The Desert Land Act is a statutory offer by the Government to sell land to qualified citizens. Cf., *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 19 (1891). The entrymen accepted that offer by filing their applications and paying the initial payment of twenty-five cents per acre, and contracts for the sale of the land were created at that time. Id. at 19-20; *Barnhurst* v. *State of Utah*, 30 L.D. 314, 318 (1900). Certain rights vest in the entryman when the contract is created, including the right to complete his purchase and to perfect title by further compliance with the terms of the act, according to the interpretations of the act in effect at the time the entry is made. *Instructions*, 6 L.D. 145, 146-147 (1887); *In re Evans*, 253 F. 956, 958-959 (D. Idaho, 1916). These contracts cannot be changed without the consent of the other parties, e.g., *Union Pacific Railroad Company* v. *United States*, 99 U.S. 700, 719 (1879), and the rights are protected by the Fifth Amendment requirement of due process. *Cf.*, *Lynch* v. *United States*, 292 U.S. 571, 580 (1934).

By its very title the Desert Land Act is an act for "the sale of desert land***." Act of March 3, 1877, 19 Stat. 377. A sale is "a contract between parties to give and to pass rights of property for money — which the buyer pays or promises to pay to the seller for the thing bought and sold.***." *Williamson* v. *Berry*, 49 U.S. (8 How.) 495, 544 (1850). Under the contract the

legal title remains in the Government, the possession passes to the entryman, and an equitable interest vests in the entryman to the extent of the payments made by him. *Cf., Jennison* v. *Leonard,* 88 U.S. 302 (1875). The intention of the parties must be considered in interpreting the contracts. *Cf., Hollerbach* v. *United States,* 233 U.S. 165, 171-172 (1913).

When the entrymen made final proof and final payment they completed performance of their contracts, and the right to receive patents vested in them. That right is treated as the equivalent of actual issuance of the patents.[32] At that time the entrymen were entitled to sell the land to any person or entity, without approval of the BLM, even though the holding limitation states on its face that it applies until the issuance of patent. *Cf., French's Lessee* v. *Spencer,* 62 U.S. (21 How.) 228 (1859). The right is recognized by a regulation which provides that after final payment the land can be sold without obtaining approval from the BLM. 43 C.F.R. § 232.18(a) (1963). It was error for the Ninth Circuit to disregard this regulation in its ruling on the vesting issue. *INS* v. *Wang,* supra.

The reason for the policy and the nature of the entryman's rights were stated in *Benson,* supra, N. 32:

> "***when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business of the Land Department causes delay. But such delay, in the mere administration of affairs, *does not*

[32] See, e.g., *Stark* v. *Starr,* 73 U.S. (6 Wall.) 402, 418 (1968); *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.,* 145 U.S. 428 (1892).

diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." (Emphasis supplied.) 145 U.S. at 431-432.

The IBLA had no authority to impose additional requirements based on interpretations developed after the initial and final rights of the entrymen had vested.

The authority of the Secretary to enforce and carry into execution the Desert Land Act is limited by 43 U.S.C. § 1201 to enforcement "by appropriate regulations." If § 1201 unduly restricts the Secretary, that is a matter for Congress to remedy, and neither unwarranted assumption of authority by the Secretary, nor unauthorized grant of authority by the courts, should be countenanced in the face of this express statutory limitation. Neither the Secretary, nor the IBLA as his delegate, had the authority to adopt and apply the IBLA's interpretation of § 329 through adjudication proceedings. There being no valid regulations defining the holding limitation or the failure-to-comply-with-the-requirements-of-law provision as the IBLA defined them in this case, its decision should be set aside as being in excess of statutory authority and without observance of procedure required by law.

When these entries were made § 329 had been in force for more than 70 years, which was ample time for the Secretary to issue interpretive regulations defining the holding limitation. In view of the Department's comprehensive duties and activities in administering the Desert Land Act, its silence regarding

leases must be deemed significant. See, e.g., *Southern Pacific Transportation Co.* v. *Commercial Metals*, ____ U.S. ____ (No. 81-622, decided April 27, 1982). More importantly, the lapse of 70 years, with knowledge at least during the period from 1950 to 1965 that development leases were commonplace for desert entries in Idaho[33] precludes any sincere argument that it was necessary to bypass the rule-making procedures of the Administrative Procedure Act (APA). If the interpretations are regarded as interpretive rules, they cannot be enforced against the entrymen prior to publication in the Federal Register as required by 5 U.S.C. § 552. The Ninth Circuit's ruling that knowledge by the Government is required before compliance with § 552 is necessary is wholly without support in the language of the statute or in any decision of this Court.

Because the IBLA's interpretations affect the entrymen's rights and obligations, by limiting their use of the land and their right to contract for the use and possession of the land, those interpretations are substantive rules that, if authorized, can be made binding only through the rule-making procedures of 5 U.S.C. § 553, and 5 U.S.C. § 558(b) expressly provides that a sanction (such as cancellation of the entries) "***may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

Because the interpretations are substantive rules, the Secretary was required to afford interested persons general notice of proposed rule making and an

[33] App. F, at F-11-F-12.

opportunity to comment before the substantive rules were promulgated.[34] The Government has never contended that any effort was made to comply either with § 552 or with § 553, and it was error for the Ninth Circuit to permit enforcement of the interpretations without compliance with the procedural safeguards of the APA.

Even if the Secretary had the power to adopt the interpretation through adjudication, the IBLA abused its discretion by applying the new interpretation retroactively to transactions entered into by the entrymen several years earlier in reliance on the existing regulations and decisions of the Department, which gave no warning that leases were prohibited and which expressly authorized mortgages.[35]

The ALJ found that the BLM knew before the entries were allowed that the entrymen intended to lease the entries to a single farm operator.[36] The administrative record contains testimony by Morris and Noble on that point, supporting the ALJ's findings. The IBLA made its finding that the Government had no knowledge of the entrymen's intentions to lease their entries solely on the letters sent by the Land Office to the entrymen after final proof had been submitted (AR, Ex. G—2, Doc. 33) See 82 I.D. at 159, App. E at E-26. In *Steadman* v. *SEC*, 450 U.S. 91, 101, this Court noted that the intent of Congress embodied in 5 U.S.C. § 556(d), was that "where there is evidence pro

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[34] 5 U.S.C. § 553; *Chrysler Corporation* v. *Brown*, 441 U.S. 281, 313 (1979); *Buschmann* v. *Schweiker*, 676 F. 2d 352 (9th Cir., 1982).

[35] *N.L.R.B* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-295 (1974); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971).

[36] App. D, p. D-24.

and con, the agency must weigh it and decide in accordance with the preponderance.***" Section 556(d) requires that an administrative decision be in accordance with the reliable, probative, and substantial evidence. The IBLA made no effort to explain why it rejected the ALJ's findings on the knowledge issue or why it did not consider any evidence other than the cited exhibit. It was error for the Ninth Circuit to accept the IBLA's finding under these circumstances; at the very least it should have remanded for an explanation of why the IBLA rejected the ALJ's findings, including his implied finding on the credibility of the witnesses, and for explanation of why the exhibit was accepted as proof of the fact over the entrymen's hearsay objection, without analysis of its reliability and probative value.[37]

The District Court based its first decision on estoppel and 5 U.S.C. § 552, making it unnecessary for that court or the Court of Appeals to decide any of the constitutional issues.[38] The Government's motion for summary judgment did not address the constitutional issues, and it would be an abuse of discretion and a denial of due process to permit the courts below to decide the constitutional issues with the case in its present posture.[39] It was also error for the District Court to deny the entrymen's petition for leave to amend by adding other constitutional claims after the mandate went down on the first appeal.[40]

[37] *Cf., Calhoun* v. *Bailar*, 626 F. 2d 145 (9th Cir., (1980); *Hoska* v. *U.S. Department of the Army*, 667 F. 2d 131-139 (D.C. Cir., (1982).

[38] See, *e.g., Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-569 (1947); *Ashwander* v. *TVA*, 297 U.S. 288, 347-348 (1935); *Harris* v. *McRae*, 448 U.S. 297, 306-307 (1980).

[39] *Fountain* v. *Filson*, supra; *United States* v. *Standard Oil Company of California*, 618 F. 2d 511, 520-521 (9th Cir., 1980).

[40] *Hormel* v. *Helvering*, 312 U.S. 552, 560 (1941).

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari be issued to review the judgments and opinions of the United States Court of Appeals for the Ninth District.

W. F. RINGERT
Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. PATRICK MORRIS, et al., *Appellees,*	)	
v.	)	No. 77-1914
CECIL D. ANDRUS, Secretary of the Interior of the U.S.A., *Appellant.*	)	
G. PATRICK MORRIS, et al., *Appellants,*	)	
v.	)	No. 77-1948
CECIL D. ANDRUS, Secretary of the Interior of the U.S.A., *Appellee.*	)	OPINION

(Filed November 16, 1978)

Appeal from the United States District Court for the District of Idaho.

Before VAN DUSEN*, WRIGHT and GOODWIN, Circuit Judges.

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*The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

GOODWIN, Circuit Judge:

The appeal and cross-appeal in this case arise out of the Secretary of Interior's decision to cancel twelve desert-land entries upon government land in Idaho following administrative proceedings under 43 U.S.C. § 329.[1]

In early 1963, twelve individuals filed declarations under 43 U.S.C. § 321 et seq. upon contiguous 320-acre parcels of desert land. The twelve entrymen concurrently made lease and contract commitments to Sailor Creek Water Co., their source of financing, under which Sailor Creek would advance the capital necessary to bring water to some 3,789.62 acres of undeveloped land. Sailor Creek advanced the money as loans to the entrymen, who in turn agreed to pay for irrigation water and gave their individual mortgages to secure the future contract payments. Eleven of the entrymen also leased their entries to Morris, the twelfth entryman, who in turn subsequently caused the twelve entries to be leased to Sailor Creek. Sailor Creek thereby became both the mortgagee of the anticipated title and the lessee of the possessory interests in the several tracts of land.

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[1] 43 U.S.C. § 329 (as amended):

"* * * [B]ut no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands. * * *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under sections 321 to 323, 325 and 327 to 329 of this title shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States."

The effect of the leases and mortgages and other related contracts was clearly a violation of 43 U.S.C. § 324:

"No assignment after March 28, 1908, of an entry made under sections 321 to 323, 325 and 327 to 329 of this title shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized * * *."

The Department of Interior challenged the entries after development work had been completed. The administrative law judge held generally in favor of the entrymen. The Interior Board of Land Appeals reversed the administrative law judge and held that because the entries and subsequent arrangements violated § 324, the entries were subject to cancellation under § 329. This action was filed by the entrymen to compel the issuance of the patents.

The district court gave both parties partial relief. The court ordered the Secretary to issue the contested patents upon proof that Sailor Creek had divested itself of all impermissible interests in the entries. Both parties appeal.

The government claims both the power and duty to cancel the entries; and the entrymen claim that their interests had vested and could not be canceled.

The entrymen are wrong. The statute states that "no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than" 320 acres of land, and provides for contesting and cancellation. 43 U.S.C. § 329.

The government's point is more complicated. The government relies both upon the plain language of the statutes and relevant court decisions. *See, e. g., Reed v. Morton,* 480 F. 2d 634 (9th Cir.), *cert. denied,* 414 U.S. 1064, (1973).

The government also relies upon the trial court's specific finding, which is undeniably correct, that the Sailor Creek scheme constituted an assignment within the meaning of § 324, and that the consolidated interests amassed under the contracts and leases constituted a "holding" in excess of 320 acres, in violation of § 329.

Even though the facts in the case at bar are far less egregious than were the secret engagements and understandings in *Reed v. Morton,* supra, the facts as found by the administrative law judge and by the district court clearly permitted the Secretary to cancel the entries. The IBLA was consistent with its earlier decision in *Ollie Mae Shearman,* 73 Interior Dec. 386, 427 (1966), when it rejected arguments virtually parallel to those offered by the entrymen here.

Were it not for the equitable arguments offered in the trial court and renewed here, the trial court undoubtedly would have recognized its limited scope of judicial review and concluded the case upon finding that §§ 324 and 329 had been violated.

This court has noted that the scope of review permitted the federal courts is limited by the Administrative Procedure Act, 5 U.S.C. § 706:

> "* * * The district court and this Court are entitled only to determine if the Secretary's decision is arbitrary or capricious or unsupportable by substantial evidence, considering the record as a whole. * * *
>
> "* * * The courts may not substitute their judgment for that of the administrative agency's expertise in the field * * *." *Multiple Use, Inc. v. Morton*, 504 F.2d 448, 452 (9th Cir. 1974) (citations omitted).

The district court correctly noted that courts "give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute," (*quoting Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27 (1971), and found that the Secretary's cancellation of the entries was statutorily authorized.

It was nonetheless held that cancellation of the entries some two years after the irrigation works had been constructed was an abuse of discretion. Despite the mandatory language of § 329, the district court felt that cancellation would be "egregiously harsh under the circumstances of this case," and held the government to be estopped from enforcing its statutory interpretation.

Estoppel may be applied against the government, even when it acts in its sovereign — rather than a merely proprietary — capacity. *United States v. Wharton*, 514 F.2d 406, 410 (9th Cir. 1975). It "is available

as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel," *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973). *See also, United States v. Wharton*, 514 F.2d at 411.

This Court has stated:

* * * * * * *

"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *United States v. Wharton*, 514 F.2d at 412, *quoting with approval United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970).

However, the IBLA specifically found that:

" * * * The Government was not informed of the terms of the lease agreement until after it made a specific request for the information. (*See, e. g.*, Ex. G-2 Doc. 33). The lease had, in fact, been entered into the previous year, and had already been subleased for a one year term to Sailor Creek Water Company. Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel." *G. Patrick Morris*, 82 Interior Dec. 146, 159 (1975).

Clearly, the first criterion for estoppel has not been met. In its opinion, the district court states that the administrative law judge "found that initially the Bureau was aware that entrymen intended to lease their entries to a single farming entity."

This reference back to the administrative law judge's findings unfortunately ignored the contrary decision of the IBLA, upon which the Secretary acted.

> "* * * [I]n the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs* * *." *Greater Boston Television Corp. v. F. C. C.*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

> "When an agency has authority to substitute judgment for that of a hearing officer, as federal agencies commonly do, the normal system is that the court review the findings and decision of the hearing officer. The Tenth Circuit may have violated the usual system when it directed 'the Secretary to adopt the findings and order of the Hearing Examiner and to vacate that of the Board of Land Appeals'. *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1407 (10th Cir. 1976)." Davis, Administrative Law of the Seventies (Com.Supp.1977) 111.

The court in *Diamond Ring Ranch* found the hearing examiner's finding and order to be "reasonable and

much more in keeping with the underlying facts than was that of the IBLA." *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1407 (10th Cir. 1976). No comparable finding was made by the district court in this case. Since the IBLA has all the powers on appeal of the initial decision which it would have had in making the initial decision itself, 5 U.S.C. § 557(b), its findings — and not those of the administrative law judge — were entitled to recognition in the district court. The equities operating in favor of the entrymen could not be used to invoke estoppel against the government because the first of the four requisites for estoppel — knowledge — was not satisfied.

Had the knowledge requirement been met, estoppel might have had a stronger equitable claim, especially in light of the violation of 5 U.S.C. § 552 by the Department of the Interior in not publishing regulations reflecting its 1966 interpretation of 43 U.S.C. § 329 in the Federal Register. *Cf., Morton v. Ruiz*, 415 U.S. 199 (1974).

We conclude that the district court exceeded its powers when it ordered the Department of the Interior to issue patents to the entrymen, upon divestiture by Sailor Creek of the desert-land entries assigned to the corporation.

Having determined that cancellation of the entries was statutorily justified, the district court had no legal basis for ordering the Secretary to issue patents. In an understandable attempt to do equity, the district court judge overlooked a basic administrative law policy.

"* * * [W]hen a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course* * *." *N.L.R.B. v. Food Store Employees Union,* 417 U.S. 1, 10 (1974).

Remand was not warranted in this case, however, because the absence of true grounds for estoppel left the court no choice under the statutes and case law but to affirm the Secretary's decision, thus denying relief to the entrymen.

Reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

G. PATRICK MORRIS, et al., *Appellees,*	)	No. 77-1914
v.	)	
CECIL D. ANDRUS, Secretary of the Interior of the United States of America, *Appellant.*	)	
G. PATRICK MORRIS, et al., *Appellants,*	)	No. 77-1948
v.	)	
CECIL D. ANDRUS, Secretary of the Interior of the United States of America, *Appellee.*	)	ORDER

(Filed April 9, 1979)

Appeal from the United States District Court for the District of idaho

Before: VAN DUSEN*, WRIGHT, and GOODWIN, Circuit Judges.

On December 7, 1978, G. Patrick Morris et al., appellees in No. 77-1914 and appellants in No. 77-1948, filed

*The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

their petition for rehearing with suggestion for rehearing en banc. On January 11, 1979, the court filed its order allowing a supplement to the petition to be filed and calling for a response from the government to the new material contained in the supplement; on February 5, 1979, the government filed its memorandum in response.

The opinion filed November 16, 1978, is amended as follows:

The full paragraph beginning at line 25 of the right-hand column of page 3765 of the printed slip opinion (line numbered 19, page 6 of the typewritten opinion) is deleted, and the following paragraph substituted therefor:

> Had the knowledge requirement been met, the entrymen's argument that the Department of Interior violated 5 U.S.C. § 552 by not publishing regulations embodying its interpretation of 43 U.S.C. § 329 might have taken on significance. *Cf. Morton* v. *Ruiz,* 415 U.S. 199 (1974). The analysis of equitable estoppel breaks down, however, with the finding that the government did not know of the assignments until it requested the information that revealed them.

The full court has been advised of the suggestion for rehearing en banc, of the supplement and response, and of the amendment. No judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35.

With the opinion so amended, the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

G. PATRICK MORRIS, JOAN E. ROTH, ELISE L. NEELEY, LYLE D. ROTH, VERA M. Baltzor (Formerly Vera M. Noble), CHARLENE S. BALTZOR, JUANITA M. MORRIS, NELLIE MAE MORRIS, MILO AXLSEN, PEGGY M. AXELSEN, and FARM DEVELOPMENT CORPORATION, an Idaho corporation,

Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA, and JAMES G. WATT*, Secretary of the Interior of the United States of America.

No. 80-3506
D.C. No.
VC 1-75-74
MEMORANDUM

Argued and Submitted — March 1, 1982
Decided — March 5, 1982
Appeal from the United States District Court
for the District of Idaho
Honorable J. Blaine Anderson,
United States Circuit Judge, Ninth Circuit,
Sitting by Designation

Before: KENNEDY, FARRIS, and NORRIS, Circuit Judges.

*We substitute James G. Watt, the Secretary of the Interior, as successor to the original appellee Cecil D. Andrus, the former Secretary, pursuant to Fed. R. App. P. 43.

A mandate of this court was issued to the district court after our decision was announced in *Morris v. Andrus*, 593 F. 2d 851 (9th Cir. 1978). Thereupon the trial court entered judgment in favor of the United States. The parties who were plaintiffs below now appeal a second time, claiming the trial court erred in not allowing them to amend the complaint after the first appeal and to proceed to trial on issues allegedly not considered by us. We conclude that the district court acted properly in entering judgment for the United States without further proceedings.

The judgment of the district court in the first case fully adjudicated the rights of the parties. No further relief was necessary to resolve the case and the district court's judgment therefore was final and appealable. *See Sekaquaptewa v. MacDonald*, 575 F. 2d 239, 242-43 (9th Cir. 1978). This court had jurisdiction to affirm or reverse on any of a number of the grounds which were necessary to the holding below.

The doctrine of law of the case resolves the question whether further proceedings in the district court should have been permitted after our judgment on the first appeal. Issues decided on appeal, either expressly or by necessary implication, are generally binding on remand and on a subsequent appeal. *E.g., Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061-62 (5th Cir. 1981); *Todd and Co. v. SEC*, 637 F.2d 154, 157 (3rd Cir. 1980); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 663 (5th Cir. 1974), cer. denied, 420 U.S. 929 (1975); 1B J. Moore Federal Practice ¶ 0.40410 (2d ed. 1980). We explicitly held in the former appeal that

"the absence of true grounds for estoppel left the court no choice under the statutes and case law but to affirm the Secretary's decision . . ." *Morris v. Andrus*, 593 F.2d at 855. Appellants' briefs in the instant appeal and their motion to amend their complaint after the remand do not appear to state any issues substantially different from those raised in appellants' briefs and petition for rehearing in the previous appeal, and they certainly fail to allege any issues not decided by necessary implication in our prior judgment. There being no ambiguity or flexibility in the decision of this court in the prior appeal, we conclude the district court properly interpreted that opinion as requiring entry of judgment for the United States. *Coleman v. United States*, 405 F.2d 72, 73 (9th Cir. 1968), *cert. denied*, 394 U.S. 907 (1969).

AFFIRMED.

APPENDIX D

DECISION OF THE ADMINISTRATIVE LAW JUDGE
(Dated January 29, 1971)

UNITED STATES OF AMERICA,	)	
Contestant	)	
vs.	)	
	)	
G. PATRICK MORRIS, JOAN E.	)	IDAHO
ROTH, ELISE L NEELEY,	)	013820,
LYLE D. ROTH, VERA M. NOBLE,	)	013905,
CHARLENE S. BALTZOR,	)	013906,
GEORGE R. BALTZOR, JOHN E.	)	013907,
MORRIS, JUANITA M. MORRIS,	)	014126,
NELLIE MAE MORRIS, MILO	)	014128,
AXELSEN, PEGGY M. AXELSEN,	)	014129,
Contestees	)	014130,
	)	014249,
FARM DEVELOPMENT	)	014250,
CORPORATION,	)	014251,
Intervenor	)	014252
	)	Desert Land
	)	Entries

STATEMENT OF THE CASE

These proceedings involve a group of 12 desert land entries situated on 3,781.62 acres of public land adjacent to the south bank of the Snake River near Glenns Ferry in Elmore County, Idaho. The entrymen filed final proof papers in May 1964. The contests were initiated in June 1966 by the Idaho Land Office Man-

ager, Bureau of Land Management, who filed separate complaints against each entry. Answers making general denials were filed by the entrymen.

Since the entries were developed as a group and the charges set forth in Paragraph V of the complaints are identical in each case, they were combined for hearing and decision.

A prehearing conference was held, in Boise, Idaho, on April 4, 1967. The hearing, which involved 38 days of testimony, commenced on June 26, 1967, and adjourned on August 1, 1968, with sessions being held in Boise, Idaho, and San Francisco, California. The Government was represented by Messrs. William Burpee, Riley C. Nichols and Robert S. Burr, Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho. Messrs. William F. Ringert of Boise, Idaho, and Milo Axelsen of Nampa, Idaho, represented the Contestees. Mr. Ringert also represented the Intervenor.

The final brief was filed on September 2, 1969.

FINDINGS OF FACT

I. INTITIAL FILINGS

On January 1963, G. Patrick Morris and his wife, Juanita M. Morris, Robert S. Skyles and his wife, Charlotte M. Skyles, Calvin B. Neeley and his wife, Margaret J. Neeley, each filed a desert land entry application on land in the area of Sailor Creek near Glenns Ferry, Idaho. The initial filing fee for all six applicants was remitted to the Bureau of Land Management by Mr. Skyles. Accompanying the applica-

tions were receipts for individual water permits issued to each applicant by the Department of Reclamation of the State of Idaho and a statement that the applicants intended to cooperate in the construction of an irrigation system to furnish water from the Snake River for all six entries.

On or before February 21, 1963, Lyle D. Roth and his wife, Joan E. Roth, Nellie Mae Morris and Elise L. Neeley also filed applications for desert land entries in the same area (Ex. G-84). G. Patrick Morris, acting as their agent, assisted in the preparation of the applications and remitted the fees to the Bureau (Exs. G-2, G-3, G-4; Tr. Vol. 12, p. 1864). The applications were accompanied by receipts for individual water permits and a schematic layout of a proposed high lift irrigation system designed to deliver water from the Snake River to their entries and to the entries of the first six applicants.

In March or April of 1963, through the persuasion of G. Patrick Morris, Allen T. Noble became interested in the Sailor Creek entries and he and Morris agreed to join efforts as a partnership to develop the entire project (Tr. Vol. 19, pp. 2911-2915). It was about this time that Neeley and Skyles withdrew as active participants in the efforts to obtain financing.

Of the six applications that were filed January 1963, the only entry that was later allowed was that of G. Patrick Morris. The status of the Skyles and Neeley entries is not certain as the record is silent. They may have been relinquished or they may be pending allowance.

Eight new applications for entry were filed by May 6, 1963. The applicants were: Vera N. Noble, John and Lucy Noble, John E. Morris, Keith and Della Jane Taylor, and George R. and Charlene S. Baltzor. The fees were paid by Allen T. Noble, and he and G. Patrick Morris assisted in the preparation of the applications and exhibits and acted as agents for the applicants in applying to the State for water permits. In these applications, the source of water was shown as "Sailor Creek Company" with a plan proposed for a row-crop farming operation. At this stage, the project comprised 18 applications embracing 5,760 acres of land.

The applications for John and Lucy Noble and Keith and Della Jane Taylor were subsequently relinquished and are not involved in these procedings.

On June 14, 1963, Milo and Peggy M. Axelsen each filed applications for desert land entries at Sailor Creek. On the same date, Nellie Mae Morris and Juanita M. Morris relinquished their earlier applications and filed new applications covering the entries now in issue.

II. DEVELOPMENT OF THE ENTRIES AND FINANCING

Soon after the first six applications had been filed, Morris began his attempt to obtain "mortage money" to develop what is now referred to as the Sailor Creek Project. From the outset,the applicants intended to finance the entire operation with borrowed capital (Tr. Vol. 3, pp. 457-458; pp. 1032 and 1034). Since the main expense would be the construction of a high lift irriga-

tion system to pump water from the Snake River, Morris first contacted the FHA, the Small Project Loans Division of the Bureau of Reclamation, Traveler's Insurance Company, and W. R. Ames Company (Tr. Vol. 7, pp. 1031 1101-1103). After Allen Noble became interested in the project, he contacted Farm Development Corporation who had built and financed an irrigation system for him in the Dry Lake area. On May 17, 1963, Morris wrote to Mr. B.G. Miller (an officer of Hale Brothers Associates, a parent corporation of Farmland-Idaho and Hiller Engineering Corporation) presenting a proposal to irrigate 6,160 acres of desert land, which comprised the 18 desert land entries plus 400 acres that Morris had asked the State of Idaho to put up for sale in section 16, Township 6 South, Range 9 East. In the presentation, Morris estimated a total cost of $1,990,340 which included a water distribution system, labor camp, roads, wells, sheds, bridge and a $21,600 item for "payment to Skyles and Neeley." This last item raises an inference that Morris was proposing that Skyles and Neeley be paid for relinquishing their entries. There is, however, no evidence that such payment was ever made.

On May 20, 1963, Mr. Miller met with Morris and Noble to discuss the development. The meeting resulted in an informal agreement in which Hale Brothers Associates, through their subsidiaries Farmland-Idaho, Inc., and Hiller Engineering Corporation, would finance 100 percent of the cost of development of the proposed Sailor Creek Project (Tr. Vol. 4, pp. 583-584; Vol. 9, pp. 2916-2921; Vol. 11, pp. 3136-3148; Exs. G-149, A-14).

Mr. Miller and Noble then contacted Harley McDowell (doing business as Idaho Land and Appraisal Service) and hired him to prepare a feasibility report (Tr. Vol. 37, p. 5769).

On May 21, 1963, Morris and Miller met with Mr. Ringert to discuss the legal implications of the proposal. It was proposed that Morris and Noble would farm or supervise the farming of the entries; that Farmland-Idaho and Hiller Engineering Corporation would construct the main irrigation system and finance the development of the project; and that McDowell's office would prepare the feasibility work, the handling of the applications and the final proof taking. During the discussion Mr. Miller asked if the companies he represented, or either of them, could acquire the land. He was advised by Mr. Ringert "that he could just as well forget about that until the entrymen had patent and then see if he could make a deal with them, if he wanted to at that time" (Tr. Vol. 22, pp. 5819-5820). Mr. Ringert was retained by Hale Brothers to investigate the formation of either a joint venture or a corporation to carry on the proposed plans (Tr. Vol. 22, p. 3416; Ex. G-150, Doc. U-34).

On May 28, 1963, Mr. Ringert wrote to Mr. Miller as follows:

> From our telephone conversation of yesterday morning, it is my understanding that the various parties who have filed application for desert land entries on lands in the Saylor [sic] Creek Project are agreeable to your offer to conduct water from Snake River to the property lines of the various entries at a total

price of $189.00 per acre, and that the irrigation system will be constructed by a private water corporation with whom the entrymen will contract for their water rights. It is also my understanding that the water corporation will obtain firm commitments for long term loans to the entrymen on terms agreeable to the entrymen and that the entrymen will agree to borrow funds from the lending institution which makes the commitments, the loan proceeds to be applied directly to payment of the water right contracts. The entrymen also will agree to mortage their desert land entries to secure such loans and will agree to exercise best efforts promptly to obtain patent to the lands upon which entry is made.

It is also my understand [sic] that several of the entries are to be leased to Allen Noble during the period in which the entries are being developed and made ready for final proof, under a lease agreement whereby the various entrymen shall be entitled to a fair and equitable portion of the net returns from the crops produced on the entries.

The foregoing should of course be contingent, as to each entry, upon the application for the entry being allowed by the Bureau of Land Management . . . . (Ex. G-150, Doc. U-39).

The joint venture, composed of Hiller Engineering Corporation and Farmland-Idaho, Inc., was formally created by written agreement on July 5, 1963, and was named "Sailor Creek Water Company" (Ex. G-80, File I, Doc. 14, *et seq.*). Each entryman and the water company then entered into water right contracts in which

the company agreed to construct and operate the main irrigation system for delivery of water and the entryman agreed to pay a specified amount of money for the water rights.

Payment of the purchase price of the water right contracts was secured by mortgages on each entry. The mortgages secured only the deferred installments of the purchase price and included a clause in which the mortgagee (water company) agreed to waive any right to deficiency judgment in the event of foreclosure. This latter provision was made as a result of a specific request by John E. Morris (Tr. Vol. 15, pp. 2285 through 2287). Copies of the water right contracts and mortgages were included in the feasibility report submitted to the Bureau of Land Management on July 12, 1963, by Idaho Land Appraisal Service in support of the applications for the 12 entries later allowed and now in issue (Ex. G-80, Files 1, 2 and 3). Sailor Creek Water Company paid the cost of the feasibility report.

Sometime prior to August 1963, G. Patrick Morris decided to attend school in Chicago. Before leaving Idaho he made an arrangement with Sailor Creek Water Company to provide him a fixed monthly sum for one year to be repaid from his "equity in the water company" (Tr. Vol. 27, p. 4154; Ex. G-150, Doc. U-66). On August 5, 1963, he was reimbursed $1,438.90 for the expenses he incurred in connection with the project and for his past work (Ex. G-149, Doc. H-25; Tr. Vol. 22, p. 3371). Of this amount, $1,300 was compensation to him for the time he had spent working on the Sailor Creek matters prior to July 26, 1963.

Pursuant to Morris' agreement, he received 12 payments of $400 each. On the corporate books the payments were first treated as "compensation." Later, an agreement was prepared and signed by Morris which provided that the $400 monthly checks were to be repaid from his equity in the Sailor Creek Water Company

Noble also entered into an employment agreement, dated August 10, 1963, with the joint venture in which he was to act as a field manager for construction and management of the proposed water system at a monthly salary of $1,000 (Ex. C-CH).

On August 30, 1963, the Bureau of Land Management recognized Sailor Creek Water Company as a source of water supply for the 12 proposed land entries which are now in issue, involving a total of 3,789.62 acres in the area of Township 6 South, Range 9 East, Boise meridian, Idaho (Ex. G-80, File 3, Doc. 9).

On August 30, 1963, Mr. Miller wrote a memorandum for inclusion in the Sailor Creek Water Company file summarizing the situation as it then existed. The portions of the memorandum which reveal the intent of the company at this phase of the project follows:

From: B .G. Miller

The Sailor Creek Water Co. has been formed as a joint venture by two of our wholly-owned subsidiaries, Hiller Engineering Corp. and Farmland-Idaho, Inc. At the outset, the Water Company will build an irrigation system to provide water from the Snake River to 3700 acres of desert entry land in

Elmore County, Idaho. There are another 10-12,000 acres of land adjacent to the project which are susceptible to the same treatment as the first 3700 acres. The Water Company will continue to supply water to the land as well as to acquire land and actively farm land for its own account. Allen Noble and Pat Morris will be admitted as one-third owners each.

Desert entry is a right available to each resident of a state which permits him to file upon up to 320 acres of U. S. owned desert land when he can show that it is economically and agriculturally feasible to bring water to the land and to cultivate it for "higher use". When the entry is "allowed" (i.e. feasibility theoretically demonstrated), the entryman has as many as nine years (including renewal) to bring ⅛th of his entry into crop. When he has done so, the U. S. Bureau of Land Management will issue him a patent granting fee title to him for the entire entry.

It is important to note that, in the interval between "allowance" and patent, the entryman may treat the land exactly as if title vested in him, except that he cannot make any undertaking in this period to sell the developed land. He may mortgage it, however, and the mortgage is enforceable against the land in the interval before patent as well as after patenting. However, if foreclosure occurs before patent issues, the successful bidder must be a qualified entryman.

In May of this year, G. Patrick Morris and Allen Noble approached Farmland as well as Ames to go

into partnership in the development of desert entries filed by them, members of their families, and personal friends. Our proposal to them was more acceptable than our competitors', and we began detailed planning of the development. Both Morris and Noble believe that these lands should be under common management and possibly, at a later date, common ownership. The intent of the Desert Entry legislation, however, precludes any person or entity from rights to more than one entry. While I am confident that Morris and Noble are genuine in their belief that, when the land proves and is patented, they will be able to buy the land at a modest price because of their close relationships with the entrymen, it seemed prudent to plan that this might not happen. Good faith can weaken markedly when a dollar sign gets far enough to the left of the decimal point.

For this reason, the original partnership idea was shelved and the joint venture was used. Farmland and Hiller have each agreed to contribute $25,000 to their capital accounts in the venture and stand ready to cause HBA to lend as much as $175,000 to it (a total of $225,000 as discussed by the HBA Board). When, as, and if Morris and Noble each contribute two sections of land (1280 acres), more or less, to the venture, they will be entitled to a one third interest apiece.

Since we can't have a binding agreement as to the land contribution by Noble and Morris, they wanted some assurances as to their participation. I have

agreed that their assignment of the leases to all 3700 acres to the Company will be consideration for ½ of their stock, when we incorporate, if ever.

The Water Company sold each entryman a water contract in which the entryman agrees to buy, and the water company agrees to supply, irrigation water. The entrymen assigned their water permits to the Water Company and secured their obligations to the Company on the contract by the first real mortgage on their entries. Aside from normal boilerplate, these mortgages also provide:

1. The entryman will diligently, and in a timely manner, farm the entry or cause it to be farmed.
2. He will diligently pursue the issuance of the patent.
3. He will not refinance the contract without prior written approval from the Water Company.
4. In the event of default of the entryman under 1 or 2, the water company may have peaceable possession of the entry in order that it may farm it in order to obtain the patent for the entryman and perfect its lien as against the world.
5. He will pay his water bills.

We have leased the laterals to them, but we have only sold him the *use* of the main system. In a hypothetical case where the contract would be paid in cash, the Water Company would have a profit of $59,648 per entry since it would still own the water *system* . . . (Ex. G-150, Doc. A-15).

It must be emphasized that the comments are Mr. Miller's and reflect only his understanding, for there was no evidence that any of the entrymen had seen or knew of the existence of this memorandum.

The water contracts were executed early in August 1963 by the 12 entrymen and the Sailor Creek Water Company. Under the contract, the entrymen were obligated to pay a down payment of $5,200 for a 320-acre entry. The payment was to be due when the entries were allowed (Ex. G-130, p. 4). The rent for the land was sufficient to permit the entrymen to pay the annual water contracts and provide them with cash to pay their income taxes on the reduction in principal.

Although primarily the form of the water right contracts and mortgages was a result of negotiations, discussions and examinations by G. Patrick Morris, Allen T. Noble (acting for the entrymen), and Mr. B. G. Miller (as representative of the water company), the entrymen had given their consideration to the terms of the water contract and the terms of the morgage (Tr. Vol. 12, p. 182 — Roths; Tr. Vol 14, p. 2130 — Baltzors; Tr. Vol. 33, p. 4957 — Axelsen; Tr. Vol. 8, pp. 1262-1263 — Morrises).

Immediately after the Bureau of Land Management granted permission on September 11, 1963, the Sailor Creek Water Company began construction of the penstock pump bases and part of the pipeline of the irrigation system (Ex. G-80, File 4, Doc. 101; Tr. Vol. 19, p. 2936).

III. LEASING THE ENTRIES

Most of the entrymen had intended from the outset to have the land in their respective entries farmed by a tenant or tenants (Tr. Vol 33, p. 5020 — Axelsens; Tr. Vol. 14, p. 2049 — Baltzors; Tr. Vol. 12, p. 1861 Roths; Tr. Vol. 35, p. 5370 Nellie Mae Morris; Tr. Vol 8, p. 1198 Elise Neeley). On September 23, 1963, in furtherance of this intent, all of the entrymen except G. Patrick Morris assigned to Morris and Allen Noble farm leases having a primary term of two years with two five-year renewals at the option of the lessees. The leases provided for annual cash rental of $25 per irrigable acre for two years with option for two additional five-year periods of $22.50 and $30 per acre per year. The leases provided that after the allowance of the entry by the Bureau of Land Management the lessees should have the right to enter the land for the purpose of preparing the land for cultivation and planting crops. It provided that the lessor should pay all *ad valorem* taxes upon the real property and should pay all purchase price and interest payments which have become due under the terms of the water contract. In addition to the cost of preparing the land for cultivation, the lessees agreed to furnish the seed, fertilizer, labor, machinery, farm implements and any other necessary expenses. The lessees had the right to determine the crops to be grown, the soil treatment and fertilization. They further agreed to keep the sprinkler irrigation system owned by the lessors in good condition. The leases were subject to cancellation if the entries were rejected or cancelled by the Bureau of Land Management.

Under the leases, if the lessees failed to take care of the premises as stated, the lessors could hire others to repair any damage due to negligence and charge the cost of repairs to the lessees. The lessors had the right to enter upon the premises to inspect the land and the crops but could not reasonably interfere with the farming operations of the lessees.

And finally, the leases were fully assignable.

In October and December of 1963 Peggy Axelsen gave 99-year leases to two 40-acre tracts within her entry. However, the leases to Morris and Noble were still in effect, so the 99-year leases never became effective and were cancelled in 1967. It was upon the two 40-acre tracts that the company erected permanent farm structures.

In January of 1964 a sublease for one year from Morris and Noble to Sailor Creek Water Company was prepared. This sublease was signed in April 1964 and was for the lands leased to Morris and Noble by the entrymen (Ex. G-80, File 3, Doc. 37). In the fall of 1964 the sublease was superseded by an assignment by Morris and Noble to the company of the 11 leases. At the same time, Morris leased his entry to the company for a one year term with two successive five-year renewal options.

IV. ALLOWANCE, RECLAMATION, CULTIVATION AND FINAL PROOF

The applications for the 12 desert land entries now in issue were allowed by the Bureau of Land Manage-

ment in the period November 1, 1963 through March 13, 1964. Sailor Creek Water Company then began clearing, brushing and leveling the land in each of the entries (Tr. Vol. 19, p. 2940). Construction of the main irrigation system was completed for the most part in late April 1964. It was built to serve one large acreage but could readily be converted to serve individual entries by the addition of water meters. Most of the clearing, brushing and leveling was completed by the end of May 1964 and crops had been planted on the irrigable portions of all 12 entries by June 5, 1964.

With Noble employed as farm manager, the group of entries was set up as one large farm with an overseer's home, farm equipment repair shop, grain bins, large field potato storage building, residence for workers, and an airplane landing strip. The farm was cropped without regard to the boundaries of the individual entries.

On April 15, 1964, the leases were amended because the entrymen had determined not to purchase and install the hand-move laterals. Consequently, the rent was reduced by $1,600 a year or $5 per acre per year. In July 1965, Farm Development Corporation, under a conditional sales contract, sold the laterals back to the entrymen, who in turn leased them back to Farm Development Corporation. Apparently the primary reason for this transaction was the entrymen's understanding that the Bureau of Land Management would not issue patents unless the laterals were owned by them (Ex. G-150-U-11).

On June 8 and 9, 1964, each of the 12 entrymen made final proof before Harley M. McDowell of Idaho Land & Appraisal Service. Mr. McDowell or one of his employees then delivered the final proofs with supporting documents to the BLM Land Office at Boise and made the final payment for each entry. Sailor Creek Water Company then paid Idaho Land & Appraisal Service for the account of each entryman.

On July 7, 1964, the Bureau sent a letter to each entryman requesting copies of the contractual arrangements between them and the developing company. Copies of the lease agreements, amendments and subleases were delivered on July 24, 1964.

On September 4, 1964, the joint venture between Farmland-Idaho, Inc., and Hiller Engineering Corporation was terminated and Farmland-Idaho, Inc., acquired Hiller's interest and assumed Hiller's liability arising from the joint venture (Ex. G-150-R-59). On the same date Farmland-Idaho changed its name to Sailor Creek Water Company (Ex. G-150-R-60). Sometime prior to November 30, 1964, Farm Development Corporation was organized as the parent company for all Hale Brothers Association operations in Idaho with Sailor Creek Water Company as its wholly owned subsidiary (Ex. G-150-W-145).

On September 14, 1964, Morris wrote a letter to Mr. Miller in which he outlined the terms on which he would sell his interest in the leases acquired by himself and Allen T. Noble in the Sailor Creek Project. He proposed to sell 10 percent of his interest for $25,000

cash plus $175 per month for 20 years plus a forgiveness of the existing mortgage amounting to $8,500.

Later, a meeting was held in Boise with Morris, Miller, Noble and Mr. Thoreau, President of Hale Brothers, Inc., to discuss Morris' offer of September 14, 1964. On October 22, Mr. Thoreau wrote down the decisions made at the meeting (Ex. G-337). It was agreed that an assignment of Morris' interest in the leases would be made for one-sixth of the $450,000 anticipated net profit on Sailor Creek in 1964 ($75,000), plus $50,000 for the remaining 11-year term of the leases, plus the forgiveness of advances Morris had by then received totaling $9,300. In accordance with these decisions, a document was executed by Morris and officers of Farmland-Idaho, Inc., in November 1964 whereby Farmland agreed to pay Morris $134,300 and to grant him an option to 300 acres of State land being purchased by Farmland (Ex. G-54).

Primarily, because Allen T. Noble was to be employed as farm manager of the Sailor Creek Project, his arrangement with Farm Development Corporation was entirely different. It was intended that he could leave his money in the venture, risking it for one-sixth of the net crop (Ex. G-246). On October 22, 1964, Noble agreed with Miller and Mr. Thoreau to sign the leases under terms similar in form to those agreed to by Morris. Arrangements were then made to sell Noble 10 percent of Farm Development Corporation (Ex. G-150, Doc. S-92 and D-32; Tr. Vol. 22, pp. 3407-3408, 3431-3434; Vol. 23, pp. 3680-3682). He was also permitted to purchase shares of the Hale Brothers stock with 1500

shares being placed in escrow for him (Tr. Vol. 23, pp. 3681-3682). If the entrymen were aware of the agreements between Morris and Noble and Hale Bishers, they were only generally aware and did not know the details.

Each entryman has made the required payments under his water right contract. The payments were made from the entryman's personal checking account. In each instance, the payment would be made after the entryman had received and deposited to his account the check received from the lessee for rental of the land. The obligation of the entrymen to repay the lessee for the costs of developing the entries, including preparation for cultivation, legal costs, feasibility reports and filing fees, was never clearly defined. Apparently the entrymen understood that when patent was issued there would be a tally of expenses and they then would each be assessed their pro rata share.

It was not until August 1964 that Lyle and Joan Roth each signed memorandum agreements in which they agreed to repay the water company $30 per acre for the expenses of preparation of the land for cultivation. To guarantee payment, the Roths agreed to execute a promissory note and a second lien mortgage. All of the other entrymen (except John E. Morris, then deceased) signed executed similar memorandum agreements on Feburary 17, 1965. These agreements, however, quoted a figure of $23.50 per acre for costs of preparation.

The water company did not set up individual ledger accounts to record each entryman's obligation for ex-

penditures made on his behalf. However, it is evidenced by a memorandum made by Mr. Thoreau, dated December 20, 1964, that it was the intention of the company to charge the entrymen for all other expenses incurred not covered by the memorandum agreement--"Charge entrymen for all costs to work on land title WERC, legal, etc." (Ex. G-150-W-142). On January 12, 1965, Mr. Thoreau also noted: "Pro ration of all costs--Beege agrees to keep track." (Ex. G-150-W-44, p. 2). On March 12, 1965, Mr. Miller wrote to Morris about securing patents and allowance of more entries (Ex. G-149, Doc. A-23). The letter reads, in part:

> As we have all known, substantial costs have been incurred for counsel, attorneys, travel and other expenses; and further efforts will require more money. We are happy to advance it, and I certainly think we should finish the fight, because I think we just about have the job done. When it is all washed up, we'll total up the bill and allocate them as fairly as possible.

On April 30, 1965, Mr, Thoreau noted : "Get each one to make an agreement on all expense, secured only by their interest in the land." (Ex. G-149, Doc. A-10).

As of December 31, 1967, the Sailor Creek Water Company or the Farm Development Corporation had paid rent under the land leases aggregating approximately $30,640 on each entry except Peggy M. Axelsen's and Nellie Mae Morris', and these two had received an aggregate of $24,895 each as of December

31, 1967. These are the amounts called for by the various leases as of those dates.

CONCLUSIONS

Following are my conclusions as to the allegations set forth in Paragraph V of each complaint:

I. Allegation (a)

(a) Application for entry was not made in good faith in that (1) the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. sec. 321, and (2) the contestee, or others acting on his behalf, prepared and filed documents with the land office which concealed and falsified relevant facts and arrangements.

Title 43, section 321 of the United States Code, pertaining to desert land entries, provides:

> It shall be lawful for any citizen . . . upon payment of 25 cents per acre- -to file a declaration . . with . . . the Secretary of the Interior . . . that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter . . . .

In essence, the Contestant has alleged that at the time the applications were submitted each entryman intended to enter the land and obtain patent for the use and benefit of some other person or corporate entity and that in furtherance of this scheme concealed

and falsified facts and arrangements which, if known to the Land Office, would result in the denial of the application.

Contestant argues that G. Patrick Morris and Allen T. Noble selected the entrymen with the end in view that each, because of his close friendship and relationship with Morris and Noble, would be amenable to direction. Contestant also argues that the entrymen selected had no intention to do anything on the land but were willing to sign papers so long as they were not committed to do anything or to expend their own money. In other words, the Contestant alleges that the Contestees are merely dummies who had no desire, ability or means to participate actively in reclaiming and farming their entries and that Morris and Noble, acting on behalf of themselves and the Farm Development Corporation, obtained effective control of the entries.

The facts and the testimony adduced do not support this allegation. First, it is important to note that the allegation is limited by its own wording to matters pertaining directly to the application for entry. For this allegation to be sustained as a basis for cancellation of the entries, it must be shown that the original intent of the entrymen at the time the applications were submitted was to enter the land with no intent to reclaim and with a state of mind evidencing an intent not to act on their own behalf but for others only. The documents alleged to have been falsified are the documents submitted with the applications.

All of the entrymen were called as witnesses and were examined by the Contestant at great length. Each of them reiterated that it was their intention to cause the land to be reclaimed for their own use and benefit. To further this end, the Contestees or entrymen made applications for water rights, entered into lease agreements in contemplation that their land would be farmed jointly with other entrymen, signed mortgage agreements, assignment of water rights, purchase agreements for delivery of water and purchase agreements for water laterals. Admittedly, in these arrangements they relied heavily upon G. Patrick Morris and Allen T. Noble. There was little or no active participation by them in the preparation of the feasibility report and the documents signed by them were prepared by the attorney for the Farm Development Corporation, the entity which ultimately actively reclaimed the land.

What must be borne in mind in any analysis of the actions by the entrymen is that the development of these entries is not possible through individual effort. It is conceded by the Contestees that the construction of an irrigation system sufficient to effectively reclaim the land must be done on a group basis. It would be impossible for an entryman on a 320-acre tract of land to expend the money or obtain financing on an individual basis to conduct water to his entry. An entryman must, therfore, join in a cooperative venture or effort to obtain financing and as a group reclaim sufficient acreage to justify the initial expenditure for the main irrigation system. Certain financial arrangements

must, therefore, be entered into on a collective basis. The desert land law does not prohibit collective or cooperative arrangements by entrymen to develop their entries as a group.

Initially, the Bureau, through its actions, encouraged such arrangements and was fully aware that the entrymen intended not only to obtain 100 percent financing but to lease the land to a single farming entity so that the land could be permanently reclaimed. The Bureau was also aware that the entrymen did not submit individual personal checks for their application for entry fees and that in most instances the entry fees were paid on behalf of the entrymen by their representatives or agents.

Thus the Bureau was aware of all of the facts necessary to make a judgment as to whether compliance was had with the intent and requirements of the law. It knew the entrymen were going to farm the land as a unit and through an agent. The Bureau was aware that the entrymen were going to finance the expenses of reclamation and obtaining water. It knew of the leases from the entrymen to Noble and Morris and it knew of the assignment of the leases from Morris and Noble to the Farm Development Corporation. If there exists other relevant facts and documents which should have been brought to the attention of the Bureau officials, these documents have not been shown to exist. After six weeks of testimony from the entrymen, from officials of Farm Development Corporation and Hale Brothers Association, from officers and employees of Idaho Land & Appraisal Service, and,

more important, after opportunity was given the Contestant to conduct a complete audit of the books of Farm Development Corporation, no evidence was found that documents existed other than those submitted in support of the applications.

It is true that as the work developed and as plans were being formulated that some of the plans were changed. This would be normal and completely understandable as facts and figures were gathered and is not, in and of itself, grounds for suspicion of concealment of relevant facts and arrangements. If, in fact, there were no changes made as the plans were developed, suspicion might be aroused in the normal mind that there was no *bona fide* intention to reclaim the land but merely to file papers unsubstantiated by the facts to induce Bureau officials to allow the applications.

I find, in summary, that the entries were made in good faith and that the entrymen, through their agents, had intent to reclaim, irrigate and cultivate the land for their own use and benefit. I further find that there is no evidence showing that documents filed with the Land Office concealed and falsified any relevant facts or arrangements.

Allegation (a) is dismissed.

II. Allegations (b) and (c)

Allegations (b) and (c) are inextricably related and will be considered jointly.

(b) The contestee entered into arrangements whereby his entry was assigned to and for the benefit of a corporation in violation of section 2 of the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

(c) The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 329.

Pertinent language of Title 43 U.S.C. § 324 provides:

No assignment . . . shall be allowed or recognized, except it be to an individual . . . but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Title 43 U.S.C. § 329 provides:

. . . but no person or association of persons shall hold by assignment or otherwise prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert lands. . . .

If prohibited assignments were made, it follows that the assignees would hold in excess of 320 acres. Proof of the first constitutes proof of the second. Briefly, the facts are that the entrymen entered into water contracts with Sailor Creek Water Company. The company agreed to construct and operate the main irrigation system for delivery of water and the entrymen agreed to pay the specified sum for the water rights.

Payment for the water rights was secured by a mortgage on the entries.

Except for G. Patrick Morris, all of the entrymen signed to Morris and Noble farm leases having a primary term of two years at an annual cash rental of $25 per irrigable acre. The lessees had renewal options for two additional five-year periods at $27.50 per acre per year for the first five-year option and $30 per acre per year for the second five-year option.

With respect to the occupation and control of the entries, the lease terms are not unusual. The lessees acquired no more privileges than those ordinarily granted to a farm tenant. They obtained the right to farm the land, determine the crops to be grown, the soil treatment and fertilization. They were obligated to pay all costs required for the preparation of the land for cultivation and operation of the farm. They agreed to keep the sprinkling system owned by the lessors in good condition and farm the land in accordance with the usual course of husbandry in the locality.

The lessors agreed to pay all *ad valorem* taxes assessed on the real property and the purchase price due on the water right contracts. The lessors had the right to enter the land and inspect the crops but could not unreasonably interfere with the farming operations. If the land was damaged due to negligence of a lessee, a lessor could hire others to repair the damage and charge the cost to the lessee.

The mortgages, standing alone, do not constitute a prohibitive assignment. The right of an entryman to

mortgage his entry prior to patent either to an individual or to a corporation has been upheld in several decisions. (See *Hafemann v. Gross*, 199 U.S. 342 (1905); *Whitney v. Buckman*, 13 Cal. 536 (1859); *Bashore v. Adolph*, 238 Pac. 534 (Ida. 1925); *Worthington v. Typton*, 173 Pac. 786 (Wyo. 1918). The regulations of the Department of the Interior expressly recognize this right. Section 2521.4 (a) of the code of Federal Regulations (43 CFR 2521.4 (a)) provides:

> A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereon and not as a conveyance thereof . . .

It is also recognized that an entryman has the right to hire others to perform the work necessary for reclamation of the entries (*Williams v. Turk (sic)*, 38 L. D. 429 (1910)).

As authority for cancellation of the entries, the Contestant cites the ruling of the Department of the Interior in the case of *United States of America v. Ollie Mae Shearman et al.*, 73 I. D. 386 (1966). In this case it was held that a mortgage to a corporation, coupled with a contract to reclaim under a long term lease which gives the lessee right to possess, reclaim, farm, retain the farming proceeds and pledge the entries, constitutes a prohibitive assignment and holding in excess of 320 acres of desert land. The Solicitor stated:

> If the entrymen gave to Hoodco the right to enter upon the lands and to grow and harvest crops, they

transferred to Hoodco, insofar as the limited nature of their estate permitted, an interest in the land which amounted to an assignment. Since Hoodco is a corporation this assignment would not be authorized by law and could not be recognized.

However, the *Shearman* case was appealed to the United States District Court, District of Idaho, Civil No. 1-65-86 and 1-67-97. The Court, in reviewing the record, held, on March 13, 1970, as follows:

> After examining all the evidence presented to the Secretary, it is further evidenced that the Secretary erred as a matter of law in determining the legal effect of a security transaction between the entrymen and Hood Corporation. He erred in holding that the same constituted illegal assignments of the desert entries. The instruments constitute a legal and proper financing plan for the joint development of the entries. It follows that no assignment was made to a corporation and that Hood Corporation did not hold more than the 320 acres of land provided in the desert land law.

The Court did not give in its decision a rationale for its conclusions. However, that decision is the law within that jurisdiction unless overruled on appeal. A notice of appeal has been filed and the decision is not final. But even if the District Court's decision be overruled on the specific issue of whether or not there were prohibited assignments from the entrymen to Hoodco, there are distinctions of fact between that case and the case now before me.

In the *Shearman* case, Mr. Reed and Mr. Michener, who promoted the Indian Hill Project, developed a financial proposal which contemplated that they (Reed and Michener) would try to develop the project with nonrecourse notes, mortgages and leases in which case the entrymen would receive $10 an acre for the land in their entries after patent. These notes, mortgages and leases were not made to an entity having financial capability of developing the entries but were made to the Indian Hill Irrigation Company, which had no real assets.

In the present case, the entrymen, through their agents, dealt directly with the financing corporation and each entryman acknowledged that he would bear his share of the development costs. The leases provide for direct payment of rental to the entrymen with the authorization to withhold part of the rent only if there was a default in the water right contract payments.

The Contestant contends that the entrymen knew nothing of the contractural arrangements they entered into and that each entryman signed instruments without giving it worthwhile evaluation. Actually all the testimony shows is that the entrymen, four years after the fact of entering into the agreements, had no detailed present recollection of the discussions they had concerning these instruments. Further, the only provision for "nonrecourse" in any of the contractual agreements between the individual entrymen and Sailor Creek Water Company or Farm Development Corporation is found in the Waiver of Deficiency clause in the mortgages. The various contractual arrangements

were valid and binding agreements. The water right contracts and mortgages were submitted to the Bureau several days before the mortgages were signed by the entrymen and the entrymen were advised that they would have to sign the contracts before the applications would be considered for allowance.

It was found in the *Shearman* case that the irrigation system was not constructed so that the entries could be farmed as individual units. In the instant case, Mr. Swarner, the Contestant's expert on irrigation systems, while critical of the design of the system at Sailor Creek, concluded that the entries could be irrigated individually by the installation of devices and inauguration of a rotation arrangement between the owners. Keith Andersen evaluated the system from an engineering standpoint (Tr. Vol. 32, p. 4826). Allen Noble evaluated the system from a practical operational viewpoint (Tr. Vol. 20, p. 3044). Thomas Campbell examined the system for the Bureau in connection with the sufficiency of the reclamation of the lands (Ex. G-1, Doc. 78, p. 1). All of these experts concluded that the system is capable of furnishing water for irrigation on an individual basis with a minimal amount of alteration.

Many of the entries involved in the *Shearman* case did not have access roads and there were no rights-of-way for roads, canals and pipelines. In the instant case, the main irrigation system was constructed on a right-of-way granted by the United States of America to Sailor Creek Water Company (Ex. G-80, File No. 4) and all the entries have access roads (Exs. G-105 and G-340).

In the *Shearman* decision the farming entity had the right to discontinue farming and to declare the balance of the notes due and payable within one year after payment. The period of the lease was 20 years. In the present instance, the lease to Sailor Creek Water Company was for two years with two five-year options to renew or a total of 12 years. Sailor Creek cannot discontinue farming until the expiration of the first five-year renewal option and it cannot declare the deferred balance of the water right contracts due and payable unless the water user is in default with respect to his or her obligations under the water right contract.

Finally, it was the finding in the *Shearman* decision that Hoodco Farms offered to purchase each entry after patent for $10 per acre and agreed not to withdraw the offer for a period of six months after patent. It was found that when the entries were made, the entrymen were not acting in good faith but with an intent to evade the provisions of the law. In the present case there have been no such offers to purchase and it has not been shown that the entrymen were acting in bad faith. At the most, it has been shown that there have been discussions between officers of the Farm Development Corporation (FDC) and Noble and Morris about the possibility for purchase of the entries after patent. These offers were never made or discussed with the entrymen. None of the entrymen agreed to sell the land in their entries after patent. Nor does the record contain testimony or documentary evidence which would infer that any entryman had agreed to sell the land in his or her entry after patent.

At this point a vital question must be answered — that is whether the agreements entered into by the entrymen with the Sailor Creek Water Company and the actions of the lessee in performing the work done upon the entries placed the entrymen in such a position that they would have no alternative but to sell to the lessee when patent was obtained. In other words, would the entrymen be in a position to farm the entries individually if they so desired? If, at the expiration of the leases, the entrymen were not in a free bargaining position with respect to any future plans for their entry and thus forced to sell to the FDC, the fact that they entered into no agreement to sell would be meaningless. The entrymen would, in effect, be dummies and pawns of the FDC. The FDC's intent would be the intent of the entrymen.

There is nothing in the evidence to indicate that the entrymen would be forced to sell to the FDC at the expiration of the leases. The fact that the entrymen have acquired a perpetual right to the delivery of a stated quantity of water from the FDC has not been challenged. If the FDC failed to exercise its second renewal option under the leases, the payments of the entrymen cannot be accelerated. The entrymen's obligations under the water rights contract, the conditional sales contract and the memorandum of agreement for preparation of the land for cultivation are fixed. The only elements for negotiation are the costs of legal fees, feasibility reports and other miscellaneous items which cannot be fixed until patents are issued. If necessary, now that a permanent water right is assured, the entrymen can either farm the land as indi-

viduals or seek new tenants. They would not be subject to any unusual risks or obligations as farm landlords or as farm owners than those assumed by their counterparts anywhere.

In 6 Corpus Juris Secundum Assignments, Sec. 2b (1), the following is found (at p. 1048):

> The term (assignment) also imports the transfer of the entire title or interest of the assignor in the subject matter . . . and therefore does not include a mere mortgage or pledge . . . or lease. . . .

The distinction between a lease and an assignment referred to in the last citation is as follows (Sec. 2b (7), at p. 1049):

> An assignment differs from a lease in that by a lease one transfers or grants an interest less than his own, reserving to himself a reversion, while by an assignment the assignor transfers the entire estate and reserves no rent or interest in the property assigned.

It has been held by the Department of the Interior that an assignee of a desert land entry should be entitled to all of the rights of the entryman and that the entry should be treated as an entirety and that no patent can be issued on a partial interest. (See *David B. Dole*, 3 L.D. 214 (1884); *Henry W. Fuss*, 5 L.D. 167 (1886); *Bradbury v. Dickinson*, 14 L.D. 1 (1892); *Snow v. Northey*, 19 L.D. 496 (1894); *Luther J. Prior*, 32 L.D. 608 (1904); *Campbell v. Glover et al.*, 35 L.D. 474 (1907); *Michael H. Fallon*, 36 L.D. 187 (1907).) And that an assignee who takes a desert land entry by

assignment exhausts his right under the desert land law precisely as if he had made the intial entry. (See *Albert A. Bandy,* 41 L.D. 82 (1912).)

If an assignee acquires the entire interest of the original entryman, he exhausts his right under the desert land law. How then can there be an assignment of an entry if some interest in the land or the entry remains in the assignor? The answer must be that unless the entire interest is assigned there is not an assignment of the entry as prohibited by the meaning of Title 43 U.S.C. § 324.

Allegation (b) is dismissed.

Even though there were no assignments made in violation of section 324 of the statute, it may still be argued that an excess of 320 acres was held by the tenant in violation of section 329. The prohibition is against **holding** by **assignment or otherwise.**

There are no cases directly interpreting the meaning of the phrase **hold by assignment or otherwise** as used in the statute; nor does the statute state what kind of **holding** it prohibits.

The following general statement of the primary meaning of the word "hold" as it applies to real estate is found in 40 CJS HOLD (at p. 406):

> With reference to real estate, the word "hold" has a well defined meaning; but in seeking its meaning it must be looked at in connection with the context. In its primary significance, it means to enjoy and possess; and includes the two-fold idea of actual possession of the property **and being invested with legal title.** It has to do with the duration or tenure of the

> estate rather than with the mode of acquisition; and sometimes is not designed to measure the character of the possession. **The term has been held equivalent to "own."** (Emphasis added.)

This definition cannot be considered as conclusive, however, for the word has many different meanings depending on the circumstances or context of the sentence in which it is used. Rather than looking to a precise definition of the word, one must look to the intent of the statute. This intent was construed in the early case of *Silsbee Town Company*, 34 L.D. 430 (1906). This case was decided prior to enactment of 43 U.S.C. § 324 prohibiting assignments to corporations and involved the primary question of whether the Land Department could make inquiry into the qualifications of individuals composing a corporation to determine whether the corporation was qualifed to make a desert land entry. However, the interpretation given by the Secretary of the Interior to the legislative intent in incorporating the prohibition against the holding by **assignment or otherwise** in section 329 is valid authority today. In the *Silsbee* decision, after quoting this section, the Secretary of the Interior states:

> The language quoted clearly discloses the legislative intent that no person or association of persons shall obtain **the benefit incident to the acquisition of title** to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the benefit conferred, and in addition, ob-

tain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction. (Emphasis added.)

As section 329 is thus construed, those who obtain benefits incident to the acquisition of title to more than 320 acres are in violation of the statute. However, tenants cannot acquire these rights. The entrymen alone are the persons who have the right to seek title and they have retained other reversionary interests which have not been alienated. The rights of use and occupancy which FDC has are derived not from the United States but from the individual entrymen. The lessee merely holds the land in temporary possession for the lessor and cannot claim the lessor's paramount right of possession for himself.

Allegation (c) is dismissed.

III. Allegation (d)

(d) The contestee, or others on his behalf, filed proof papers which (1) concealed that the proof taking, the work on the entry land, and the application for entry, were for the benefit of others than the contestee, and (2) failed to show the reclamation, irrigation, and cultivation of the contestee's entry was performed as required by the Act of March 3, 1877 as amended, 19 Stat. 377, 43 U.S.C. secs. 321 through 329.

The Contestant asserts that the Contestees were making false statements because they claimed to be securing water supplies by purchase when in fact they had not made the down payment and their water

rights contracts were in default. However, under general contract law, there was no default. If Contestant's theory is sustained, it would have to be on the basis that a default is equivalent of a forfeiture of the water rights. Here, water had been delivered to each entry before final proof was made and, under Idaho law, if water has been delivered the right to the water becomes appurtenant to that land. If, in fact, there was a default, the water company's only remedy would be to sue on the debt and foreclose its mortgage. Any foreclosure would be subject to redemption within one year following the sheriff's sale. What happened in the present case is that the parties deferred the down payments by oral agreement and, while the Contestant argues that the entrymen had no obligation or intention of obtaining either a down payment or the annual installments, this assertion is not borne out by the testimony and evidence adduced.

The Contestant's brief (p. 159) also states that at the time of final proof the Contestees and the proof-taking officer concealed from the Bureau the whole scheme to place the land in corporate hands, including the fact that the lands had been leased for 12 years to a corporation and that the corporation had done all the work and paid all the expenses to reclaim the land. Contestant claims that the answers given in the final proof papers where framed in such a manner that they presented a picture to the Bureau of 12 entries individually developed and separately farmed; that it cannot be determined that the corporation farming the entries constructed the water system and owned the lateral

lines; that all expenditure for the work done had been made by this same corporation; and, finally, that the corporation had put in force a scheme to transfer the entries to the corporation after patent.

The regulations, 43 CFR 1823.2-1, with respect to the examination of claimants and witnesses under final proof states as follows:

> All final proofs should be reduced to writing by or in the presence of and under the supervision of the officer taking them, and in all cases where no representative of the Government appears for the purpose of making cross-examinations the officer taking the proof should use his utmost endeavor and diligence so to examine the entryman and his witnesses as to obtain full, specific, and unevasive answers to all questions propounded on the blank forms prescribed for the taking of such proofs, and in addition to so doing he should make and reduce to writing and forward to the manager with the proof such other and further rigid cross-examination as may be necessary clearly to develop all pertinent and material facts affecting or showing the validity of the entry, the entryman's compliance with the law, and the credibility of the claimant and his witnesses. And, in addition to this, he should inform the manager of any facts not set out in the testimony which in his judgment cast suspicion upon the good faith of the applicant or the validity of the entry.

Specifically, the Contestant points to the questions under the **Improvements** section of the final proof where dollar amounts were listed for such items as

clearing, breaking and leveling. Contestant states that this is false in two respects: (1) That the reasonable value shown was not the actual value of the work, and (2) that the entrymen did not pay for the work or agree to pay for it. The arguments as to whether an entryman must pay out of his own pocket will be discussed later. However, the Bureau offered no proof that the reasonable value of the work listed in the final proof was not the reasonable value of the work actually done upon the land. The testimony and evidence show only that work far in excess of $3 per acre was performed. If the estimated amounts as stated in the final proof were overestimated or underestimated, it cannot be reasonably inferred that the statements made are fraudulent. It cannot be inferred that fraud was committed when under the heading of **Improvements** no mention was made of who did the clearing or breaking when the feasibility study previously on file with the Idaho Land Office clearly indicated that the land would be farmed by tenants. It is clear to anyone having the entire record before him that, prior to the taking of final proof, the Bureau officials knew what was going on upon the entry, who was farming it, who was making the improvements, and, in general, all of the facts which the Contestant now states were false and fraudulently concealed in the final proof taking. As a point of fact, the answers given by the entrymen in the final proofs were simply the answers called for upon the forms provided by the Bureau. The final proof form, as filled out, does not contemplate that the entryman must prove or testify how the work was done, by whom

it was done, what was paid for the work, how payment was made, or how payment was to be paid.

In his final proof, the entryman has no burden of anticipating what inferences can be drawn from an examination of the entire case file of a desert land entry and rebutting those inferences in advance. In *McKinley Mortgage and Debenture Co.*, 21 L.D. 345 (1895), in connection with a question as to the sufficiency of an answer given on final proof, the Department stated:

> . . . It is true that the answer made by the entrywoman might ordinarily raise a suspicion as to whether she was the head of a family, but I do not think it should in this instance. The blank upon which her final proof is made, furnished by the government, did not contain the direct question as to whether she was the head of a family. The only question bearing upon this subject is quoted above, and the answer thereto is full and unambiguous. . .

In summary, it has not been established that false information was given to anyone in connection with these entries nor were any facts or arrangements concerning these entries concealed from the Bureau. In the case of *Nancy M. Hough*, 47 L.D. 621 (1912), the Department overruled a decision of the Commissioner of the General Land Office which rejected a desert land entrywoman's final proof papers on the grounds that the water supply was insufficient to irrigate the entry and the cultivation did not appear sufficiently remunerative to establish good faith. The Department,

in ruling that such requirements were not imposed by statute nor contemplated by Congress, stated (at p. 623):

> The requirements are fulfilled if at least one-eighth of the land is irrigated and cultivated, and the entryman owns a sufficient water right and has constructed ditches or other conveyances, has brought water to the land, and is prepared to turn water upon the entire tract when it shall have been prepared for cultivation. (Cited cases omitted.)

It has been established that the land in each entry has been completely reclaimed, irrigated and cultivated and the reclamation and cultivation is entirely permanent.

Allegation (d) is dismissed.

IV. Allegations (e) and (f)

(e) The Contestee failed to make the expenditures for the reclamation, irrigation, and cultivation of the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 328.

(f) The contestee did not reclaim, irrigate, and cultivate the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

The facts are conclusive that the lands involved in these entries were reclaimed, irrigated and cultivated and that more than $3 per acre was

expended. Further, there is no real question of fact as to who actually performed the work on the ground and as to who initially paid the bills for the work done. It was the lessee or its predecessor. The issues raised by these two allegations are, then, whether the provisions of the statute (43 U.S.C. § 328, 329) have been violated in that the entrymen did not physically perform or initially pay for the reclamation. These two allegations are interrelated and will be considered jointly.

Title 43 U.S.C. § 328, reads, in pertinent part, as follows:

No land shall be patented to any person . . . unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least $3 per acre of whole tract reclaimed . .

Section 329 states:

At any time after filing the declaration . . . upon making satisfactory proof to the . . . Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided . . . and upon payment . . . of the additional sum of $1 per acre for said land, a patent shall issue . . .

The position of the Contestees is that the source of the funds is immaterial if each entryman was leg-

ally and unconditionally obligated to pay his share of the work involved in obtaining the allowance of the entry. The position of the Contestant is that the $3 per acre must be expended from the personal funds of the entryman and that personal involvement in the reclamation of the land is required. In support of this argument, the Contestant cites two decisions, *viz., United States v. Shearman, supra,* and *In Re Henderson,* 21 Hawaii 104 (4th Cir. 1912). In finding that the entrymen in the *Shearman* case did not expend the required $3 per acre and did not reclaim the entries, the Secretary quoted and rejected as being distinguishable on the facts the cases of *Conway v. United States,* 95 Fed. 615 (8th Cir. 1899) and *Williams v. Kirk,* 38 L.D. 429 (1910).

In the *Conway* case, the Court concluded, in essence, that it was proper expenditure for a homestead entryman to enter into a contract with another whereby the entry was cleared, cultivated and buildings were built in exchange for the timber on the entry. In the *Williams* decision the Department held:

> The fact that the annual expenditures for the benefit of a desert-land entry are made by another, for the entryman, is not sufficient ground for contest, if made in good faith to effect reclamation, and not with a view to indirectly obtaining title to the land. (Syllabus).

With respect to good faith and personal expenditure, the *Shearman* decision ruled:

> . . . The Department "cannot seek the source of money expended for the purpose of reclamation" "if an entryman causes, *in good faith*, expenditure of the required amount in permanent improvements for the purpose of reclaiming and entering the land." The evidence in this case discloses that the entrymen did not act in good faith, and that Hoodco Farms, not the entrymen, caused the expenditure to be made for the reclamation.

On the basis of the facts, it is the *Shearman* decision rather than the cases of *Conway* and *Williams* which can now be distinguished from the present case. Each of the three decisions stand for the propositions that the entryman must become personally involved. must be personally liable for the expenditures made, and must be in good faith. These essential elements, found lacking in the *Shearman* case, are here present. The entrymen were in good faith in their intent to reclaim the entries for their own use and benefit. Each entryman agreed to pay a specific sum with interest in consideration of the water company constructing facilities for the reclamation of the land. On the basis of those promises, the water company expended several hundred thousand dollars in the construction of an irrigation system by which the lands in these entries were reclaimed. The company agreed to construct the system, operate and maintain it and to deliver water to the land in each entry in perpetuity for a stated amount. The water contracts were presented to and approved by the Bureau as part of the show-

ing as to source of water for the entries. Even prior to signing the memorandum agreements, each entryman was personally liable for his share of the work involved in obtaining the allowance of the entries and the cost of developing his entry. The case of *In Re Henderson* was decided by the Supreme Court of the Territory of Hawaii. It involved the validity of a "cash freehold," a form of public land disposition under the laws of the Territory of Hawaii. Under the terms of the statute, the freeholder was required to (1) pay the balance of the purchase price in equal annual installments, (2) cultivate not less than 25 percent of the premises, and (3) maintain a home from the end of the first year to the end of the third year. He was specifically prohibited from assigning or subletting his interest without approval. It was found that the freeholder had authorized another to cultivate the land. In return, the freeholder received a share of the crops, or $5 per acre per annum. The Court stated that the cultivation requirement was intimately connected with that of assignment and held that cultivation, while not necessarily to be done by the freeholder with his own hands, must be done by him or by his servants or agents for him. The Court held the crops grown must be his crops and not those of another. This construction was based primarily upon the purpose and intent of the statute which was stated to be "the settlement and occupation of agricultural and pastoral land by citizen farmers." The Court then said (at p. 118):

> To this end it is required that the freeholder shall maintain his home upon the land taken up, and that he shall not assign or sublet his interests thereon except with the consent of the commissioner. *To this end also he is expected and required to cultivate the land for it is for that very purpose that he is supposed to have applied for it.* It is with this objective in view that the government offers such lands to (sic) settlers at less than their full value and requires them to make oath that they apply for the land solely for their own use and benefit. (Emphasis added.)

The statute under which *Henderson* was decided is not analagous to the Desert Land Act and the *Henderson* case cannot support the proposition that personal expenditures are required by desert land entrymen. The basic purpose of the two acts are not the same. Under the Hawaiian statute the purpose was "settlement and occupation" of the land. The purpose of Congress in enacting the 1891 amendment to the Desert Land Act was set forth by the Department in the case of *Andrew Clayburg*, 20 L.D. 111 (1895):

> The *prime and ultimate purpose* of Congress in enacting these sections *was to secure*, through a system of irrigation, *the complete reclamation of desert lands*, so that they will produce ordinary agricultural crops; to this end a certain mode or manner of reclamation is required, and a time fixed within which the reclamation shall be completed. The mode or manner prescribed is through a sys-

tematic irrigation, by means of main canals, branch ditches, the purchase of water rights, the aggregate cost of which must be at least three dollars per acre of the whole tract entered. *If the land is reclaimed in the manner prescribed, and within the time allowed, the requisite proofs, expenditures and payments made substantially as the law requires, then the entryman will be entitled to patent for the land covered by his entry.* (Emphasis added.)

Inasmuch as the required expenditures have been made and the land reclaimed, the requirements of the statute have been met. Under the terms of the agreements entered into, the cost of the work done will ultimately be borne by the entrymen. Therefore, the Department cannot inquire into the primary source of the money expended and it is immaterial who performed the work.

Allegations (e) and (f) are dismissed.

ORDER

All of the allegations of Paragraph V of the complaints having been dismissed, the request for cancellation of the entries is denied.

It appearing on the record that full compliance with the Desert Land Act has been made by the entrymen, patents should issue.

/s/ John R. Rampton, Jr.
John R. Rampton, Jr.
Hearing Examiner

APPENDIX E

DECISION OF THE INTERIOR BOARD OF LAND APPEALS

UNITED STATES

v.

G. PATRICK MORRIS, ET AL.

19 IBLA 350

Decided *April 7, 1975*

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., dismissing contest complaints against twelve desert land entries and refusing to order their cancellation.

Reversed.

1. Desert Land Entry: Generally

An arrangement by which an entity obtains mortgages on desert land entries and also obtains leases of a possible twelve year duration on the desert land entries, the result of which is the vesting of effective control of the entries in such entity, constitutes a holding within the purview of sec. 7 of the Act of Mar. 3, 1877, *as amended*.

2. Desert Land Entry: Generally — Words and Phrases

"Hold." Any person or entity which has acquired actual possession and the right thereof to more than 320 acres of desert lands "holds" such acreage within the meaning of the prohibition of sec. 7 of the Act of Mar. 3, 1877, *as amended*.

3. Desert Land Entry: Generally — Words and Phrases

"Otherwise." As used in sec. 7 of the Act of Mar. 3, 1877, *as amended*, "no person or association of persons shall hold by assignment of otherwise * * *," "otherwise" is not limited to other means equivalent to assignment but rather embraces all mechanisms whereby control of and benefit from an entry or entries are accumulated and transferred.

4. Desert Land Entry: Generally — Desert Land Entry: Cancellation

Violation of the prohibition against holding an excess of 320 acres constitutes a failure to comply with the requirements of law and such entries are properly canceled.

5. Desert Land Entry: Generally — Desert Land Entry: Cancellation

Estoppel will not lie against the Government where there is no showing that the parties to illegal agreements relied in any way on the statements or acts of Government officials.

APPEARANCES: William F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellees; Riley C. Nichols, Esq., Office of the Solicitor, United States Department of the Interior, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The Government appeals from the decision of Administrative Law Judge John R. Rampton, Jr., dated January 29, 1971 dismissing contests against twelve desert land entries and refusing to order the cancellation thereof.[1] The contests had been initiated in May of 1966 by the Idaho Land Office Manager, Bureau of Land Management. The contest complaints alleged that:

(a) Application for entry was not made in good faith in that (1) the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. sec. 321, and (2) the contestee, or others acting on his behalf, prepared and filed documents with the land office which concealed and falsified relevant facts and arrangements.

(b) The contestee entered into arrangements whereby his entry was assigned to and for the benefit of a corporation in violation of section 2 of the act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

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[1]The entries involved in this appeal are: G. Patrick Morris, I-013820; Joan E. Roth, I-013905; Elise L. Neeley, I-013906; Lyle D. Roth, I-013907; Vera M. Noble, I-014126; Charlene S. Baltzor, I-014128; George R. Baltzor, I-014129; John E. Morris, I-014130; Juanita M. Morris, I-014249; Nellie Mae Morris, I-014250; Milo Axelsen, I-014251; Peggy Axelsen, I-014252.

(c) The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 329.

(d) The contestee, or others on his behalf, filed proof papers which (1) concealed that the proof taking, the work on the entry land, and the application for entry, were for the benefit of others than the contestee, and (2) failed to show the reclamation, irrigation, and cultivation of the contestee's entry was performed as required by the Act of March 3, 1877 as amended, 19 Stat. 377, 43 U.S.C. secs. 321 through 329.

(e) The contestee failed to make the expenditures for the reclamation, irrigation, and cultivation of the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 328.

(f) The contestee did not reclaim, irrigate, and cultivate the entry land as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

Timely answers were filed denying the allegations.

Extensive hearings were held commencing on June 26, 1967, and terminating on August 1, 1968, aggregating 38 days of testimony. Both parties thereupon submitted lengthy and detailed briefs. The Judge in his decision found for the contestees on every allegation in the Government's complaint. Specifically, he found that the entries had been made in good faith (Decision

at 15-18 [hereinafter "Dec."]), the entries had not been assigned to a corporation nor did any individual "hold" more than 320 acres of land (Dec. at 18-26), the proof papers did not conceal relevant facts (Dec. at 26-29) and the entrymen made the necessary expenditures in reclaiming, irrigating and cultivating the lands (Dec. at 29-33). The Government timely filed a notice of appeal.

After careful consideration we have reached the conclusion that the Judge's decision is in error and must be reversed. A lengthy recitation of the factual disputes will not be necessary since the facts upon which our determination is based are not controverted. Our specific area of concern relates to the question of whether Sailor Creek Water Company held in excess of 320 acres of desert land in contravention of sec. 7 of the Act of March 3, 1877 *as amended*, 26 Stat. 1096, 43 U.S.C. § 329 (1970).

Prior to entry each entryman acquired a permit to appropriate the waters of the State of Idaho.[2] All the permits, with one exception, were then assigned to the Sailor Creek Land and Water Company of Nampa, Idaho, in June of 1963.[3] In August of 1963, the Sailor

[2]It should be noted that Milo Axelsen, Peggy Axelsen and Juanita Morris did not acquire a water permit for their lands. A permit for the lands embraced in Milo Axelsen's entry had originally been obtained by John E. Noble, Permit No. 31119. A permit for the lands embraced in Peggy Axelsen's entry had originally been obtained by Lucy M. Noble, Permit No. 31118. Permits for the lands embraced in Juanita Morris' entry had originally been obtained by Keith Taylor, Permit No. 31122, and Della Jane Taylor, Permit No. 31123. All four permits were assigned to Sailor Creek Land and Water Company of Nampa, Idaho, and eventually to the Sailor Creek Water Company of Twin Falls, Idaho (Ex. G—141; G—142; G—80 file 1 at 266-77).

[3]Elise Neely's Permit No. 30983 was not assigned to the Sailor Creek Land and Water Company in June. Rather it was directly assigned to the Sailor Creek Water Company on July 23, 1963 (Ex. G—129).

Creek Land and Water Company assigned all of the permits to the Sailor Creek Water Company of Twin Falls, Idaho. The Sailor Creek Water Company was the result of a joint venture entered into on July 5, 1963, by Hiller Engineering Corporation and Farmland — Idaho, Inc., both of which were subsidiaries of Hale Brothers Associates. Subsequently Farmland-Idaho, Inc., changed its name to Farm Development Corporation [FDC]. In September of 1964 the joint venture was terminated with Hiller Engineering transferring its shares in the Sailor Creek Water Company to FDC (Ex. C-CI, C-CJ). FDC, for reasons of convenience, continued to do business under the name of Sailor Creek Water Company (Prehearing Tr. at 26-27).

On August 7 and 9, 1963, the entrymen entered into Water Rights Contracts with the Sailor Creek Water Company *(See e.g.,* Ex. G-13). In these agreements Sailor Creek Water Company agreed to construct an irrigation system and supply the entrymen with water at the rate of $9.31 per acre foot. The entrymen agreed "to farm and irrigate [their entries] to the fullest extent of the acreage thereof as is consonant with good husbandry and farming practice . . ." *(See e.g.,* Ex. G-13 at 8-fa.) The total purchase price of the water right varied according to the acreage involved in the individual entries. Initial payment was to be made within thirty days of the allowance of the entry, with subsequent annual payments over the succeeding nineteen years.[4]

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[4]The total amount varied from $59,648 for 320 acres to $48,464 for 280 acres. (*See generally* Ex. G—149, Doc. O.)

At the same time the entrymen and Sailor Creek Water Company entered into a mortgage of their entries for the sum of the purchase price of the water right, less the initial payment. *(See e.g.,* Ex. A of Ex. G-13 [hereinafter *Mortgage*].) Among the provisions of the agreement was a requirement that the mortgagors (the entrymen) pay all taxes and assessments *(See e.g., Mortgage,* at 2-fa), and authorization for the mortgagee to enter upon and take possession of the entry, and receive all rents which were overdue in the case of any default on the agreement. *(See e.g., Mortgage,* at 3-fa.) Finally, each mortgage contained the following provision:

> That the mortgagee, by accepting this mortgage, agrees that the obligation, obligations or debts secured by this mortgage shall be fully satisfied upon receipt of the proceeds of any sale had for the foreclosure of this mortgage and that such acceptance shall constitute a waiver of rights to any deficiency which may remain after the application of the proceeds of such sale. *(See e.g., Mortgage,* at 4-fa.)

Copies of each of these morgages were filed in the land Office on March 27, 1964.

On September 23, 1963, eleven of the entrymen leased their entries to the twelfth entryman, G. Patrick Morris, and to Allen T. Noble. *(See e.g.,* Ex. G-2, Doc. 34.) Each lease was for a term of two years with the right of two subsequent five year renewals. Section 3 of the lease provided that the lessors (the entrymen) pay all ad valorem taxes assessed upon the real property and comply with all of the terms, including

payment, of the Water Rights Contract. All costs of planting were to be borne by the lessees. Similarly, the lessees exercised total control over the selection, growing and harvesting of crops. Section 9 of the lease agreement provided, *inter alia*, that:

> [t]he parties specifically agree that the lessees shall have the right to withhold from the annual cash rental payable to the lessor for the then current calendar year an amount equal to the installment of purchase price and interest due and payable from the lessor and spouse to the said Sailor Creek Water Company during such current calendar year under the terms of the aforesaid contract, and the lessees shall deliver any amount so withheld to the said Sailor Creek Water Company to the credit of the lessor and spouse in payment of the then current annual installment of purchase price and interest due from the lessor and spouse to Sailor Creek Water Company under the aforesaid contract, and such delivery shall constitute payment of the applicable annual cash rental to the extent of the amount so delivered. (*See e.g.*, Ex. G-2, Doc. 34 at 6-7.)

Lessees, of course, retained all revenue generated from the farming operations. The lessees were obligated to pay the lessors an annual rental sufficient to cover their required payments under the Water Rights Contract, foreseeable ad valorem taxes, and income taxes on the principal reductions of their outstanding debt to

Sailor Creek Water Company. (See Tr. XXXVIII at 5855; Ex. G-149, Doc. A, A-15 at 6-7).[5]

On January 1, 1964, G. Patrick Morris leased his entry to the Sailor Creek Water Company (G-1, Doc. 33). On the same day, Allen T. Noble and G. Patrick Morris subleased the other entries to the Sailor Creek Water Company. Both the lease and the sublease were for a term of one year commencing January 1, 1964 (G-150, Doc. X, X-9). Noble and Morris were to receive one-third of the net profit derived from the sale of all crops grown and harvested. The Sailor Creek Water Company agreed to make all payments due under the original leases, and assumed all other obligations under the lease terms.[6]

On September 30, 1964, Morris assigned his undivided one-half interest in the other entrymen's leases to the Sailor Creek Water Company for the sum of $134,300, as well as an option to purchase two parcels of land (Ex. G-150, Doc. X, X-5). Simultaneous thereto, as security for payment, Sailor Creek placed in escrow a reassignment of the leases back to Morris. On February 18, 1965, Noble and the Sailor Creek Water Com-

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[5]The Administrative Law Judge in his decision, stated that the cash rental was "$25 per irrigable acre for two years with option for two additional five-year periods of $22.50 and $30 per acre per year." (Dec. at 10.) The Judge apparently relied on a memorandum written by B. G. Miller, an officer of Hale Brothers Associates, which discussed a sliding scale of payments for the renewal years. (Ex. G—149, Doc. A, A—15 at 6—7.) That memorandum, however, employed the sum of $27.50 instead of $22.50. In any case, the actual leases specifically provided that the same rent would be paid for renewal years as that required for the original two year terms. (*See e.g.*, Ex. G—2, Doc. 34 at 4.)

[6]Through inadvertence the original sublease agreement embraced Morris' entry on S ½ sec. 8, T. 6 S., R. 9 E., B.M., which had been leased to Sailor Creek Water Company on Sept. 30, 1963. Therefore, on August 14, 1964, the sublease was amended to delete those lands. (Ex. G—150, Doc. X, X—8.) Three days later Morris assigned one-half of the rental owing on his lease to Allen T. Noble. (Ex. G—150, Doc. X, X—7.)

pany reduced to writing an agreement made on October 22, 1964, in which Noble assigned to Sailor Creek Water Company his undivided one-half interest in the leases for $134,300 and an option to purchase two parcels of land (Ex. G-150, Doc. R, R-87).

On the same date that Morris assigned his one-half interest in the other entrymen's leases to the Sailor Creek Water Company, he also leased his own entry to the company for a one-year term with the right of two successive five year renewals (Ex. G-150, Doc. X, X-3).

Thus, by 1965 the Sailor Creek Water Company had a mortgage on all the entries, had leases with an eleven year possible life, had absolute authority to determine what would or would not be grown, oversaw all of the planting and harvesting operations, and retained all profits derived from these operations.[7]

[1-3] Section 7 of the Act of March 3, 1877, *as amended*, 26 Stat. 1096, 43 U.S.C. § 329 (1970), provides, in relevant part, that:

> * * * no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert land * * *.

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[7]It should also be noted that on October 4, 1963, Peggy Axelsen entered into a ninety-nine year lease with the Sailor Creek Water Company for the NW ¼ SW ¼ sec. 2, T. 6 S., R. 9 E., B.M. for $25 per year. (Ex. G—12, Doc. 37.) On December 6, 1963, a similar lease was entered into for the SE ¼ SW ¼ sec. 2, T. 6 S., R. 9 E., B.M. (Ex. G—12, Doc. 38). As the Judge in his decision noted "the leases to Morris and Noble were still in effect so the 99-year leases never became effective and were cancelled in 1967." (Dec. at 11.) Cancellation, however, did not occur until after the initiation of contest proceedings.

The operative phrase of this section is "hold by assignment or otherwise." The Government cites the Departmental decision in *United States* v. *Shearman* [Indian Hill], 73 I.D. 386, 426 (1966) and the *Solicitor's Opinion, Idaho Desert Land Entries - Indian Hill Group,* M-36680, 72 I.D. 181 (1965), as support for its contention that appellants' actions have resulted in a violation of the proscriptions of the Act. The Judge ruled that the Sailor Creek Water Company, being in the position of a tenant, had not violated the prohibition of the Act.

There are three separate words the interplay of which must be analyzed to judge the correctness of the decision below: 1) "hold"; 2) "assignment" and 3) "otherwise."

The word "hold" has no fixed definition. Rather, its meaning can only be determined from the context in which it occurs with due regard for the legislative purpose animating its usage. *See United States* v. *Shearman, supra* at 427; *Navajo Tribe of Indians* v. *State of Utah,* 12 IBLA 1, 135-36, 80 I.D. 441, 507 (1973).

BLACK'S LAW DICTIONARY (4th ed. 1951) defines "hold" as follows:

> 1. To possess in virtue of a lawful title; * * * common in grants, "to have and to hold," * * *
>
> 2. To be the grantee or tenant of another; to take or have an estate from another. Properly, to have an estate on condition of paying rent, or performing service * * *

Id. at 864

The *Solicitor's Opinion, supra,* discussed the scope of the word "hold" as it appears in the statute and concluded that two elements must be present: (1) actual possession and (2) the right of actual possession. Under the leases involved herein, the Sailor Creek Water Company clearly had a right of actual possession. Indeed, section 1 of the Lease Agreement, relating to the effective commencement of the leasing period, provides a mechanism for "the lessees to enter into possession of said premises and produce the normal crops which the lessees intend to grow on said premises. * * * *" (See e.g.* Ex. G-2, Doc. 34 at 3.) The Sailor Creek Water Company pursuant thereto entered into actual possession and proceeded to grow crops on the lands embraced by the entries.

Appellees, in their briefs to the Administrative Law Judge [*Brief of Contestees and Intervenor*] and to this Board [*Appellees' Answer*], argue at length that the *Solicitor's Opinion, supra,* is unsupported in either the case law or a careful analysis of the purposes and intent of the Desert Land Act. Their reading of the statute would limit the sweep of the word "hold" to ownership and disregard any interpretation which would embrace a leasehold interest.

Appellees contend that there is support for such a construction in the Coal Land Act, March 3, 1873, 17 Stat. 607, 608, 30 U.S.C. §§ 71-74 (1970), in the limitation, under the reclamation laws, of the amount of land assignable — one farm unit (*i.e.,* up to 160 acres) —

prior to final payment of all charges for the land, sec. 13 of the Act of August 13, 1914, 38 Stat. 690, 43 U.S.C. § 443 (1970), in the acreage limitations found in Sec. 3 of the Act of August 9, 1912, 37 Stat. 266, 43 U.S. C. § 544 (1970), and in the judicial and Departmental Interpretations thereof.

We are not persuaded by the statutory comparisons advanced by appellees. Section 4 of the Coal Land Act provides, in relevant part, that:

> The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or *hold* any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or *hold* any other lands under their provisions; * * *

30 U.S.C. § 74 (1970).
(Italics added).

The cases which appellees cited to the Judge below, in reference to the Coal Land Act, *see Brief of Contestees and Intervenor* at 190-93, suffer from two infirmities. First, the cases uniformly involve acquisition or attempted acquisition of title. Thus, the language of the decisions is naturally couched in phrases denoting acquisition. *See e.g., United States* v. *Colorado Anthracite Co.*, 225 U.S. 219 (1912); *United States* v. *Keitel*,

211 U.S. 370, 388 (1908). But it does not follow that acquisition of legal title from the Government was the only thing prohibited by the section.

Secondly, the Coal Land Act was not a settlement Act but one aimed at the development of mineral resources. In contradistinction the Desert Land Act, while obviously envisaging development of desert lands, was designed primarily to provide a mechanism by which Government land could be obtained and settled by American citizens. Thus, the Desert Land Act has a dual focus and even assuming a restrictive interpretation of "hold" under the Coal Land Act it would be improper to apply such a limiting definition to the Desert Land Act merely because such a reading has a validity under an unrelated Act.

The two sections of the reclamation laws are equally inapplicable herein. Section 13 of the Act of August 13, 1914, provides that:

> [n]o person shall hold by assignment more than one farm unit prior to the final payment of all charges for the land held by him subject to the reclamation law, except operation and maintenance charges not then due.

43 U.S.C. § 443 (1970).

Section 3 of the Act of August 9, 1912 provides *inter alia*, that:

> [n]o person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made * * * before

> final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit * * *
>
> 43 U.S.C. § 544 (1970).

A number of points must be made as regards these two sections. First, appellees admit that there are no judicial or departmental cases affirmatively construing these two provisions as *not* encompassing leases. *Appellees' Answer* at 185-88. Their argument is based on silence, on failure to act against an alleged "matter of common knowledge within the Department of the Interior that there are numerous instances of single operators leasing and farming areas within federal reclamation projects * * * far in excess of one farm unit." *Appellee's Answer* at 185. Analysis of the concerns animating the limitations, however, shows that failure to proceed against lessees under the above quoted sections of the reclamation laws was the result of factors not present in the desert land laws.

One of the main purposes of the Reclamation act was to break up existing large land holdings and prevent the establishment of future large holdings and thus assure that the benefits of the Act inured to the general public and not to a few wealthy landowners. *See generally Proposed Repayment Contracts – Kings and Kern River Projects,* 68 I.D. 372 (1961). They were both anti-speculative and settlement-oriented in general thrust. The implementation of the Act did not quiet, but rather exacerbated fears that large landowners were becoming the beneficiaries of reclamation activities to the detriment of the general American

populace. The problem which continued to plague the reclamation laws was that of a large landowner, who would merely maintain his excess holdings until the cheaper lands around his holdings had been taken by earlier settlers. These excess lands did not receive water so long as the large landowners held them, but once sold to a qualified applicant the lands would become eligible. Thus, the large landowners struck upon the simple device of retaining excess holdings until the land values had risen, due to the potential availability of water, and then selling the lands. The profits intended by Congress to flow to the individual settlers were, therefore, going instead to large landowners. By a series of amendments from 1912 to 1926 various stratagems were devised to require large landowners to divest themselves of what was seen as excessive land holdings.

The Acts of August 13, 1914, and May 25, 1926, were direct outgrowths of attempts to rectify the situation. *See generally King and Kern River Projects, supra,* at 384-96. The evils of leasing, when perceived at all, were seen in a context of large landowners leasing to tenants. It was not the lessee who was violating the intent of the Act but the subsisting ownership by which the landowner acquired the benefits of the reclamation law. As was noted by a special advisory committee in its report dated April 10, 1924:

> The tenant is not desirable on the Federal irrigation projects, for the reason that these projects were authorized with the home-building idea as the central consideration. It was hoped that those who entered

upon the projects would do so with the purpose of making permanent homes for themselves and their families. Under a system of tenantry, the farm merely becomes a long-distance investment, the profits from which, if any, are used to maintain the family in the city or at least at considerable distance from the farm.

S. Doc. 92, 68th Cong., 1st Sess. at 133.

Little, if any, weight can be given the fact that the Department has not historically proceeded against tenants in reclamation lands for violating the "holding" requirement specified in the statute. Enforcement of the reclamation laws has always been directed at assuring that the *benefits* of reclamation inured to those whom Congress sought to aid. Tenants were not seen as reaping such benefits and it is understandable that no actions against them were undertaken.[8]

Appellees also contend that past Departmental and judicial interpretations of the Desert Land Act militate against acceptance of the view that leasing is within the ambit of the proscription against "holding." Great reliance is placed by both appellees and the Administrative Law Judge on *Silsbee Town Company*, 34 L.D. 430 (1906). That case arose prior to the prohibition of corporate entries codified in 43 U.S.C. § 324 (1970) and involved the authority of the Department to go behind the corporate structure of a corporation seeking to make a desert land entry in order to examine the

[8]In a subsequent submission, received September 19, 1974, appellees cited *Blight's Lessee* V. *Rochester*, 21 U.S. (7 Wheat.) 535 (1822) and *Rector* v. *Gibbon*, 111 U.S. 276 (1884). We have examined those two cases but find them unpersuasive on the issues before us.

individual qualifications of the individuals composing it. In the course of an opinion affirming the authority of the Department to pierce the corporate veil and examine the individual makeup of corporation the decision stated:

> [t]he language quoted [43 U.S.C. § 329] clearly discloses the legislative intent that no person or association of persons shall obtain the benefit *incident to the acquisition of title* to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction * * *. (Italics added.)

Italics is placed on the use of the phrase "acquisition of title." Inasmuch as the *Silsbee* case involved the making of a corporate *entry* it is manifestly logical that the decision is couched in terms denoting ownership. Once again we do not feel it proper to draw a negative inference from the fact that the decision referred only to the acquisition of title in discussing the "holding" proscription.

We stated, *supra*, that "hold" can only be correctly construed by reference to the context in which it appears with due regard for the legislative intent implicit in its utilization. Section 1 of the original Desert Land Act, Act of March 3, 1877, 19 Stat. 377, provided:

> * * * no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres * * *.

While the Act of August 30, 1890, 26 Stat. 391, reduced the amount of land available for individual entry to 320 acres, it had no effect on the essential prohibition. A consistent course of Departmental decisions prior to the enactment of the Act of March 3, 1891, *supra*, had established the principle that the Congressional prohibition against entry in an excess of 640 acres could not be defeated by either an original entry or assignment of an entry.[9] Thus, while the 1891 Act authorized assignments which had theretofore been prohibited, clear Departmental policy had already established limitations on assignments to the maximum authorized amount of one tract of land. *See David B. Dole*, 3 L.D. 214 (1884).

Adoption of appellees' interpretation would thus result in a finding that Congress, in enacting sec. 2 of the Act of March 3, 1891, had simply re-promulgated the prior existing law. Furthermore, if, as appellees contend, "assignment" had a fixed and established meaning as of 1891 *(Brief of Contestees and Intervenor* at

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[9]*See Joab Lawrence*, 2 L.D. 22 (1884); *Peter French*, 5 L.D. 19 (1886). The Department had originally held that desert land entries were assignable, but in 1880 reversed this holding and held that such entries were not assignable. *S. W. Downey*, 2 *Copps* (1882 Ed.) 1381 (April 15, 1880). The Department subsequently held that assignments made in reliance upon the initial erroneous interpretation would be recognized, but only to the extent of one tract of land *i.e.*, 640 acres. *David B. Dole*, 3 L.D. 214, 216 (1884). The Act of March 3, 1891, *supra*, effectively nullified the Department's interpretation of the 1877 Act as prohibiting all assignments. *See Luther J. Prior*, 32 L.D. 608 (1904).

It could, therefore, be argued that the 1891 Act far from expanding a holding prohibition beyond that embraced by "assignment" was merely permitting actions formerly prohibited under the Act of March 3, 1877. Such an analysis ignores the fact that to the extent that the Department had allowed recognition to be given to assignments in the *Dole* case it had specifically held that no more than one tract of land might be taken by such *assignment*. "Assignment" was thus a known quantity and had Congress intended to limit the holding provision to assignments there would have been no necessity to add the phrase "or otherwise."

133-43) it is difficult to see why Congress did not simply state that "no person or association of persons shall hold by assignment prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert land." The only ostensive reason which appellees' advance for the inclusion of the phrase "or otherwise," namely, "other means equivalent to assignment," implicitly rests upon an assumption that enforcement of the prohibition against assignments is limited to only those instances in which entrymen call their transactions "assignments." But the general rule has always been that "courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect * * *." *United States* v. *Shearman, supra* at 426, citing *Arbuckle* v. *Gates,* 95 Va. 802, 30 S.E. 496 (1898).

Finally, we believe that statutory analysis compels the conclusion that more than title transfer is prohibited by sec. 329. The entire proscription is against holding, *prior* to the issuance of patent, an excess of 320 acres. Since legal title remains in the United States until patent, limiting the prohibition to transfer of ownership would make the act an effective nullity. Rather we believe it covers situations involving agreements to transfer title once acquired as well as arrangements which result in the accumulation or transfer of effective control of and benefit from land in excess of statutory restrictions prior to issuance of patent. *See United States* v. *Shearman, supra* at 428.

Turning to "assignment" we note that the Department in the *Indian Hill* case determined that: "[a]ssignment as used in [sec. 329] is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries." 73 I.D. at 428. The Ninth Circuit Court of Appeals in *Reed* v. *Morton*, 480 F.2d 634 (1973), *cert. denied*, 414 U.S. 1064, affirmed the finding that the actions of the entrymen therein constituted prohibited assignments. Heavy emphasis, however, was placed upon the fact that "the entrymen understood * * * that they were transferring their interests to the developers for $10 an acre, and that they did not regard themselves as having any interest in the land after this meeting." *Id.* at 640.

In the instant case the Administrative Law Judge found that:

> None of the entrymen agreed to sell the land in their entries after patent. Nor does the record contain testimony or documentary evidence which would infer that any entryman had agreed to sell the land in his or her entry.

(Dec. at 23.)

Assuming, arguendo, the lack of an agreement to transfer the lands after issuance of patent it is unnecessary for us to decide whether these actions nevertheless effectively constitute an assignment. *But see United States* v. *Alameda P. Law*, 18 IBLA 249, 81 I.D. 794 (1974). The entire phrase is "assignment or *otherwise*." (Italics added.) Regardless of what ever techni-

cal argument can be mounted over the meaning of "assignment," we believe appellees must run afoul of the more embracing concept embodied in "otherwise."

Appellees argue strongly that the doctrine of *ejusdem generis* should be applied so as to limit the scope of "otherwise" to, "other means equivalent to assignment." *Brief of Contestees and Intervenor* at 200 g. Appellees' analysis suffers from two discrete infirmities.

First, the doctrine of *ejusdem generis* is not applicable. Shortly stated, the rule provides that where words of general import follow words of specific and particular meaning, the general words are not extended to their widest limits but are rather limited in meaning to the general class of the words specifically mentioned. Thus, *ejusdem generis* is merely a narrower construct of the maxim *noscitur a sociis, i.e.,* the meaning of the word may be known from accompanying words. But use of the word "otherwise" in the statute before us negates appellees' contention, since we are not faced with a succession of specific words but merely a single specific word. "Otherwise" by its nature implies a differentiation from words conjoined. *Black's Law Dictionary, supra,* defines "otherwise" as "[i]n a different manner, in another way, or in other ways." *Id.* at 1253. *See e.g. Dunham* v. *Omaha & Council Bluffs St. Ry. Co.,* 106 F.2d 1,3 (2d Cir. 1939); *Newport Air Park, Inc.,* v. *United States,* 293 F. Supp. 809, 811 (D.R.I. 1968). Appellees would invoke a doctrine of construction, of questionable utility in the instant case, to nullify the plain meaning of a simple

word. But a basic tenet of all statutory construction is that words are construed in their ordinary meaning. *Mason* v. *United States*, 260 U.S. 545 (1923). Appellees' interpretation would negate the entire meaning of the word. *See generally Sutherland, Statutory Construction* §§ 47.17-47.22.

Even more importantly the meaning of "otherwise" is largely controlled by the meaning of "hold." Appellees, by adopting a narrow construction of the word "hold," argue that "otherwise" by its nature is circumscribed so as only to cover "means equivalent to assignment." Taking a less restrictive view of the meaning of "hold," however, immediately leads to a definition of "otherwise" which is more inclusive in ambit. We have discussed above the reasons for rejecting the definition of "hold" advanced by appellees, and no purpose would be served by a reiteration of the reasons given for adopting a definition which includes all mechanisms whereby control of and benefit from the entries are accumulated or transferred. Clearly, the structure of control exhibited by the documentary submissions of both parties leads to the inescapable conclusion that Sailor Creek Water Company with the aid of the individual entryman violated the prohibition against holding an excess of 320 acres of desert land prior to the obtaining of patent.

[4] Appellees contend that cancellation of the entries, even assuming a violation, would be improper for two reasons. First, they argue that a violation of the holding requirement is not a proper ground upon which to cancel the entries. *Brief of Contestees and*

Intervenor at 265-74. Section 2 of the Act of March 3, 1891, 43 U.S.C. § 329, provides, in relevant part, that desert land entries:

> * * * shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or *failure to comply with the requirements of law,* and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States. (Italics added.)

Appellees contend that the italicized provision applies only to positive requirements of the law, *e.g.*, cultivation of ⅛th of the entry within four years, but does not reach the negative prohibitions of the holding limitations. Such an interpretation can scarcely be credited, particularly since the Ninth Circuit Court of Appeals in *Reed* v. *Morton, supra,* specifically held that violations of the prohibition against assignments to corporations, also a negative prohibition, warranted cancellation of the entries. We find that a holding in excess of 320 acres is a failure to comply with the requirements of law such as would require cancellation of the entry.

[5] The appellees also contend that the Government should be estopped from invalidating the entries. Their brief to this Board states:

> * * * all the transactions which occurred between the entrymen and the water company or Morris and Noble were presented to the BLM either as part of the applications or as part of the feasibility report or

in discussions with BLM representatives or as part of the supplemental proof submitted by each entryman. At the times it received the various items of information the BLM was obligated to advise the entrymen that it considered the transactions as constituting assignments which it could not recognize. *Appellees' Answer* at 225.

While their argument is specifically directed at a finding of assignment, it is equally applicable to a violation of the holding requirement "by assignment or otherwise." Initially, it should be noted that the Government, as a general rule, is not estopped to attack illegality. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389 (1917); *Reed* v. *Morton, supra,* at 643 (1973). The situations which estoppel will lie against the Government have been strictly circumscribed by various court decisions. (*See e.g., Brandt* v. *Hickel,* 427 F.2d 53 (9th Cir. 1970); *United States* v. *Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973). In *Marathon Oil Co.,* 16 IBLA 298, 81 I.D. 447 (1974), this Board examined at some length the parameters within which the exception to the general rule is operative. Therein, we stated that an exception is recognized where: "(1) the erroneous advice is in the form of a crucial misstatement in an official decision; (2) the result of the misstatement violates standards of fundamental fairness; and (3) the public's interest is not unduly damaged by the imposition of the estoppel." *Id.* at 316, 81 I.D. at 455.

Appellees' contentions are clearly insufficient to invoke estoppel under the criteria set out above. They

point to no "crucial misstatement in an official decision." Rather, they argue that they relied upon a failure of Governmental employees to inform them of the illegality of their actions. One could scarcely expect the Government to caution parties against illegal acts when such acts are not brought to the Government's attention until after their consummation. The illegal act involved herein was the result of the totality of the arrangements entered into between the entrymen and Sailor Creek Water Company. The Government was not informed of the terms of the lease agreement until after it made a specific request for the information (*See e.g.*, Ex. G-2, Doc. 33). The leases had, in fact, been entered into the previous year, and had already been subleased for a one year term to Sailor Creek Water Company. Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel. Having examined the record before us, we find no alternative but to order the rejection of the final proofs tendered and cancellation of the entries.

As this holding is dispositive of the case, we find it unnecessary to rule on the other holdings in the decision of the Administrative Law Judge, or on the merits of the arguments of appellants thereon. This decision accords with our holdings in *United States* v. *Golden Grigg*, 19 IBLA 379, 82 I.D. 123 (1975), decided this date.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the

Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed, the final proofs are rejected and the case files are remanded for cancellation of the entries.

Douglas E. Henriques,
Administrative Judge.

We concur:

Edward W. Stuebing,
Administrative Judge.

Martin Ritvo,
Administrative Judge.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

G. PATRICK MORRIS, et al.,	)	
Plaintiffs,	)	
	)	Civil No.
vs.	)	1-75-74
	)	FINDINGS,
UNITED STATES OF AMERICA,	)	CONCLU-
et al.,	)	SIONS AND
Defendants.	)	ORDER

Reporter's Transcript of proceedings held December 10, 1976, at Boise, Idaho, before the HONORABLE J. BLAINE ANDERSON, United States Circuit Court Judge, Ninth Circuit, sitting by designation.

FRIDAY, DECEMBER 10, 1976

BOISE, IDAHO

THE COURT: This matter has been under submission since last August, I believe, and I called for reargument on these points and now I think the time has come for a decision and as the old saying goes, the buck stops right here for now and now a decision is in order so that this matter can move on.

I hope my study over the last five or six months or more leads to a correct conclusion and, if not, it can be tested in the Court of Appeals.

The Reporter will prepare a transcript and it will be entitled Findings, Conclusions and Order in the appropriate place and I will so indicate to you where you can close it with my signature. A copy is to be served on counsel.

First, I am going to give, for the benefit of the record, a little recital of not the facts, but the background.

In May, 1966, the Idaho Land Office Manager of the Bureau of Land Management initiated contests against the desert land entries of the plaintiffs. Extensive hearings before Administrative Law Judge John L. Rampton were commenced on June 26, 1967, and terminated on August 1, 1968, constituting 38 days of testimony and evidence. The Administrative Law Judge issued his decision on January 29, 1971, and dismissed the contest complaints against the twelve desert land entries. The government appealed that decision to the Interior Board of Land Appeals. The IBLA on April 7, 1975, reversed the Administrative Law Judge's decision, holding that the entrymen's lessee, Sailor Creek Water Company, held in excess of 320 acres in violation of 43 U.S.C. § 329 and ordered cancellation of the entries. The plaintiffs filed the present action on May 16, 1975, seeking judicial review of the IBLA's decision. This action is presently before the court on cross motions for summary judgment. The Court expressly finds that it has jurisdiction, there being no contest with respect to that.

I adopt the factual findings of the Administrative Law Judge, John L. Rampton, for the purpose of this decision. I refer to his Findings of Fact as to the entry, the things done with respect to perfecting it. The cultivation of the land and the various leases, the contracts, the mortgages and I adopt those, the legal effect of those. I think he correctly found the facts based upon the evidence.

The Bureau of Land Management allowed the 12 desert land entries in issue at various times during the period of November 1, 1963, through March 13, 1964. The main irrigation system was completed for the most part in late April, 1964. It was built primarily to serve one large acreage, but could readily be converted to serve individual entries by the addition of water meters. Most of the clearing, brushing and leveling was completed by the end of May, 1964, and crops had been planted on the irrigable portions of all 12 entries by June 5, 1964. The group of entries were set up as one large farm with an overseer's home, farm equipment, repair shop, grain bins, potato storage building, workers' residence, and an airplance landing strip. The farm was cropped without regard to the boundaries of the individual entries.

On June 8 and 9, 1964, each of the 12 entrymen made final proof before Harley M. McDowell of the Idaho Land Appraisal Service. Mr. McDowell or one of his employees then delivered the final proofs with supporting documents to the Bureau of Land Management Office at Boise and made the final payment for e ch entry. Sailor Creek Water Company then paid Idaho Land Appraisal Service for the account of each entryman. On July 7, 1964, the Bureau sent a letter to each entryman requesting copies of the contractual arrangements between them and the developing company. Copies of the lease agreements, amendments and subleases were delivered on July 24, 1964. Almost twenty-two months later on May 13, 1966, the government filed complaints seeking to contest each of the entries.

THE INTERIOR BOARD OF LAND APPEALS DECISION

The IBLA, in reversing the Administrative Law Judge's decision, focused its attention on one issue: Whether Sailor Creek Water Company held in excess of 320 acres of desert land in contravention of Section 7 of the Act of March 3, 1877, as amended, 26 Stat. 1096, 43 U.S.C. § 329 (1970). In holding that Sailor Creek Water Company did hold in excess of 320 acres, the IBLA first relied upon the analysis made in *U.S. v. Ollie Mae Shearman*, 73 I.D. 386 (1966), which held that an assignment means such interest as results in effective control of the benefits from the entries. The IBLA then relied on the *Solicitor's Opinion*, M-36680, *Idaho Desert Land Entries-Indian Hill Group*, 72 I.D. 156 (1965), which concluded that "hold" has two elements: (1) actual possession, and (2) the right of actual possession.The IBLA found that by virtue of the leases from the entrymen to Sailor Creek Water Company, the latter enjoyed both elements and, therefore, did hold in excess of 320 acres.

The IBLA further held, relying upon *Reed v. Morton*, 480 F. 2d 634 (9th Cir. 1973), cert. was later denied, that a violation of the holding requirement warrants cancellation of the entries. And, finally, that the government was not estopped from invalidating the entries now in issue.

The scope of review of an Interior Board of Land Appeals decision by this Court is to determine if the decision is arbitrary or capricious or unsupported by substantial evidence, considering the record as a

whole. *Multiple Use, Inc., v. Morton*,504 F. 2d 448 (9th Cir. 1974). The interpretation and analysis undertaken by the IBLA is supported by substantial evidence and I find it is neither arbitrary nor capricious. The question presented is one of interpretation of statutory language and, while certainly there are conflicting interpretations, the decision of the IBLA cannot be said to be without any rational basis. Additionally, in light of the Supreme Court's admonition ". . . that courts give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute,"*Investment Company Institute v. Camp*, 401 U.S. 617, (1971), the IBLA's decision that Sailor Creek Water Company held in excess of 320 acres must be affirmed.

The obvious purpose of the holding restrictions was to limit the amount of land that one individual or entity could develop in order to allow as many individuals as possible to apply for and enter the desert lands. This limitation prohibits the use of "dummy" entrymen and to prevent speculative large holdings by a few individuals. The interpretation advanced by the entrymen would allow just such a result. One individual or entity could enlist the aid of numerous entrymen to apply for the entry to the lands. This individual could then lease each of the entries from the entrymen and assume full control of the lands. The entrymen, as lessors, would retain ownership, but the lessee would have the benefits of vast acres of desert land. While it is true that the individual entrymen would receive benefits in the form of rent, the major benefit would

accrue to the lessee. Using this method, the one person could effectively tie up all remaining desert lands, a result clearly not envisioned by the drafters of the Act.

The counter argument of the entrymen is that it is too expensive for one individual to construct large irrigation systems necessary to develop the lands. This is a legitimate concern for the small landowner desirous of developing his own entry. However, there are other methods of achieving the construction of large irrigation systems without doing violence to the intent of the Act, as found by the IBLA. The Act does not prohibit joint financing of an irrigation project, the focus of the prohibition is to limit the number of acres that one individual controls. Arrangements could be made and even mortgages given that would allow for the joint financing of an irrigation system, but still retain control over the entry in the individual entryman.

The conclusion that the IBLA's interpretation of the holding provision, 43 U.S.C. § 329, is not arbitrary or capricious and must be affirmed, however it does not prevent further inquiry by this Court. The IBLA also held that a violation of the "new" holding requirement warrants cancellation of the entries. This court is of the opinion that under the facts of this case, cancellation of the entries is not required and constitutes an abuse of discretion as applied to the facts in this case. The IBLA relied upon *Reed v. Morton*, to hold that the cancellation was warranted. In *Reed* the court appears to have focused almost entirely on the fraud and secrecy of the transactions involved in that case in declaring that the entries therein must be cancelled. The court stated: 480 F2d at 642

But secret 'arrangements' and 'understandings,' like more formal contracts to pass title to desert land grants after patent, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty. . . In the present case there was an understanding that title to the lands would pass after patent," (there is no such situation here) "and that understanding was not revealed by the claimants. Because 'the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of the facts which, had they been disclosed, would have rendered the acquisition impossible,' the patents and entries must be canceled. United States v. Keitel, 211 U.S. at 395.

In the case presently before this court, there was no fraud or secrecy in the transactions of the entrymen. The Administrative Law Judge, who heard the 38 days of testimony, specifically found:

"Initially, the Bureau, through its actions, encouraged such arrangements and was fully aware that the entrymen intended not only to obtain 100 percent financing but to lease the land to a single farming entity so that the land could be permanently reclaimed. The Bureau was also aware that the entrymen did not submit individual personal checks for their application for entry fees and that in most instances the entry fees were paid on behalf of the entrymen by their representatives or agents."

"Thus the Bureau was aware of all of the facts necessary to make a judgment as to whether compli-

ance was had with the intent and requirements of the law. It knew the entrymen were going to farm the land as a unit and through an agent. The Bureau was aware that the entrymen were going to finance the expenses of reclamation and obtaining water. It knew of the leases from the entrymen to Noble and Morris and it knew of the assignment of the leases from Morris and Noble to the Farm Development Corporation. If there exists other relevant facts and documents which should have been brought to the attention of the Bureau officials, these documents have not been shown to exist. After six weeks of testimony from the entrymen, from officials of Farm Development Corporation and Half (sic) Brothers Association, from officers and employees of Idaho Land & Appraisal Service, and, more important, after opportunity was given the Contestant to conduct a complete audit of the books of Farm Development Corporation, no evidence was found that documents existed other than those submitted in support of the applications . . .

"I find, in summary, that the entries were made in good faith and that the entrymen, through their agents, had intent to reclaim, irrigate and cultivate the land for their own use and benefit. I further find that there is no evidence showing that documents filed with the Land Office concealed and falsified any relevant facts or arrangements."

Those appear at Pages 17 and 18 of Mr. Rampton's decision.

Thus, with no finding of fraud or secrecy, it is my belief that the *Reed* case loses its vitality.

More properly, the above factual finding provides a basis to employ the Bureau's decisional policy as expressed in *Freeman v. Laxson*, 48 L.D. 519 (1922) and other cases cited by Mr. Ringert in various briefs filed with this court. In *Freeman*, Dora Laxson made a desert land entry on July 30, 1901. Final proof was submitted October 30, 1902, which was accepted as satisfactory, but final certificate was withheld because the land was at that time unsurveyed. The plat of survey was filed at the time the opinion was rendered. On May 9, 1921, James R. Freeman filed a contest against the entry alleging, among other things, that on October 30, 1902, the entrywoman conveyed her interest to T. B. Craver; that T. B. Craver was not qualified to take an assignment because he had exhausted his 320-acre entitlement; that T. B. Craver was deceased and his heirs were likewise disqualified; that ever since the execution of such conveyance, the entrywoman has abandoned the land.

The Administrative Law Judge in *Freeman*, in discussing the rules governing assignment, stated:

> "The regulations governing the assignment of desert land entries contemplate that such assignments will be submitted to the General Land Office for adjudication as to the qualifications of the assignee and for recognition of the assignment. When this plan is pursued and it is found that the assignment cannot be recognized on account of the disqualification of the assignee, the assignment is disallowed

and the title is considered as retained in the assignor. But where parties fail to submit the assignment to the General Land Office, they act at their own risk and if the fact of assignment is brought to the attention of the Land Department by contest alleging disqualification of the assignee, such charge constitutes sufficient ground for a contest and for cancellation of the entry if proven or in the case of failure to make answer."

That appears at 48 L.D. at Page 520.

It is my understanding from the briefs of counsel that *Freeman v. Laxson* was carried forward even into the 1975 edition of the Code of Federal Regulations in this area.

As applied to the present case, the entrymen submitted their leases to the Bureau upon request. Additionally, the Administrative Law Judge, quoted above, found that initially the Bureau was aware that entrymen intended to lease their entries to a single farming entity. Therefore, the Interior Department did not follow its own policy in ordering cancellation, but should have disallowed the "assignments" and permitted the entrymen an opportunity to bring themselves in compliance.

It seems to me cancellation is egregiously harsh under the circumstances of this case. As noted, *Reed v. Morton* is significantly distinguishable. The result dictated by the IBLA here works an unconscionable forfeiture in favor of the government of huge private expenditures, with substantially increased land values

and without any opportunity provided to the entrymen, who were admittedly acting in good faith, to equitably redeem themselves from the change in administrative policy which occurred long after their final proof submissions.

It is my view that plaintiffs were further misled to their detriment by the long delay amounting to approximately 22 months or two crop seasons, if you want to put it that way, of the Bureau in initiating the proceedings. I recognize that during that period of time, much was going on within the Department of Interior. The fact remains the entrymen here were afforded no opportunity in this connection.

I have mentioned to you gentlemen the facet that I think does bear some examination in this connection. I do not rely upon it, except as corroborative of the record already made.

As I have indicated, I do not think I am required to void my mind of knowledge and experience which I have gained through life and the practice of the law. From about 1950 to 1965 as a lawyer, I personally attended scores and scores of desert land entries from their initiation to final proof. During this period of time, I became personally acquainted with the Bureau's personnel, including the inspector, Mr. Curtis Taylor, Mr. Penney and Mr. Orval Hadley, the manager, during these proceedings and others. I also became familiar with the procedure and policy as administered in Idaho with respect to desert land entries. During this period of time it was common practice and it was common knowledge among people who were

knowledgeable in this field of desert land entries, by that I mean lawyers, entrymen, farmers and others, it was wholly acceptable to the Bureau for entrymen to enter into development leases embracing one or more entries, giving to the lessee significant control over the entries during the lease and development period. It was common knowledge and practice. It was common knowledge and practice and the subject, of course, of Mr. Hadley's testimony in this case and also the Golden Grigg case, and while it is not formally admitted by the government, it is not seriously disputed.

I recognize what I am referring to is different in some respects from this case only because of its magnitude. The general practice of accepting government leases existed.

It seems to me that there was a significant interpretation or policy change sometime in the 22 months of 1965 or 1966, I believe. I think this is somewhat of an adjudicated fact occurring within the knowledge of this court and within its territory of jurisdiction. As I say, I consider it only as corroborative of the former record made in this case by Mr. Rampton. While the government, the Secretary of Interior, is not estopped from adopting any change in policy or interpretation as was done in this case, I think that the peculiar facts of this case warrant a holding that he is estopped from enforcing it and entering an immediate cancellation of these entries.

I also would adopt on the equitable considerations of this decision the eight or nine points made by Mr.

Ringert in his brief, Pages 12 through 14, that is the brief submitted in connection with this hearing.

I also feel very strongly that what has taken place here is a violation of the spirit and intent of 5 U.S. Code, 552, of the Administrative Procedures Act.

The order of the court will be that the decision of the Interior Board of Land Appeals as to the interpretation of 43 U.S. Code, Section 329, is affirmed.

The decision and order of the Interior Board of Land Appeals rejecting the final proofs and remanding for immediate cancellation of the entries (19 IBLA 378) is reversed, and the "assignments" of the entrymen as found in the decision are disallowed as not being to qualified entrymen, based upon *Freeman v. Laxson* and other decisions as cited by Mr. Ringert. The entrymen, plaintiffs herein, are allowed until May 1, 1977, within which to divest themselves of the disqualifying "assignments" and upon satisfactory proof thereof made to this Court, the Bureau of Land Management, Boise, Idaho Land Office, shall issue patents to the plaintiffs for their several and separate desert land entries. For failure to make such satisfactory proof within the time allotted, the entries will be canceled, as directed by the Interior Board of Land Appeals in its decision of April 7, 1975.

Within seven days from this date, plaintiffs' counsel will prepare and submit a proposed judgment carrying this decision into effect. Counsel for the parties shall attempt to agree upon the form and content of the judgment, however, any agreement shall not constitute a waiver of any ground for appellate review.

IT IS SO ORDERED.

Dated this _____ day of December 1976.

J. BLAINE ANDERSON
United States Circuit
Judge
(By Designation)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

G. PATRICK MORRIS, et. al, *Plaintiffs,*	)
vs.	) Civil No.) 1-75-74
UNITED STATES OF AMERICA, et al,	)JUDG-)MENT
Defendants.	)

This case is before the Court on the summary judgment motions of the Plaintiffs and the Defendants. On July 6, 1976, a hearing was held on the motions, and another hearing on certain specified issues was held on December 10, 1976. Counsel for each party was present at both hearings and the Court heard arguments with respect to the motions. Based upon the motions for summary judgment, the briefs, the pleadings, the administrative record and other documents on file, the Court has heretofore entered its Findings of Fact and Conclusions of Law, finding and concluding that the

Court has jurisdiction of the parties and the subject matter and that there are no genuine and material issues of fact remaining for determination, and that the Decision of the Interior Board of Land Appeals, 19 IBLA 350, dated April 7, 1975, which is before the Court for judicial review, should be afirmed in part and should be reversed in part.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that the Decision of the Interior Board of Land Appeals is hereby AFFIRMED as to the determination and ruling that the contractual arrangements between the desert land entrymen and Sailor Creek Water Company constituted holdings within the meaning of 43 U.S.C. § 329 and that Sailor Creek Water Company held more than 320 acres of desert entry land contrary to the provisions of 43 U.S.C. § 329, and the Decision of the Interior Board of Land Appeals is hereby REVERSED as to the determination and ruling that the United States of America was not estopped to apply the Board's interpretation of 43 U.S.C. § 329 to these desert land entries under the circumstances of this case and rejecting the final proofs and remanding the desert land entries for cancellation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the totality of the contractual arrangements between the entrymen and Sailor Creek Water Company is regarded as constituting assignments of the entries and those assignments are disallowed as not being to qualified entrymen, based upon the ruling of the Department of the Interior in *Freeman* v. *Laxson*, 48 L.D. 519 (1922), and other deci-

sions of the Department. The Plaintiffs are allowed until May 1, 1977, to divest themselves of the disqualifying assignments as found by the Interior Board of Land Appeals in its decision. The Plaintiffs shall submit to this Court the instruments entered into by them to accomplish divestitures as hereinbefore specified and shall serve copies upon counsel for the Defendants. The Defendants shall have ten (10) days following service of those instruments within which to file with the Clerk of this Court any objections they have to the instruments submitted by the Plaintiffs, following which the Court will notify the parties of its approval or disapproval of the methods and instruments adopted by the Plaintiffs. If the Plaintiffs submit, on or before May 1, 1977, proof of divestiture which is satisfactory to this Court, the Idaho State Office of the Bureau of Land Management at Boise, Idaho, upon service of the Court's order approving the proof submitted by the Plaintiffs, shall issue patents to the entrymen as follows:

Name	Legal Description of Land
Milo Axelsen	T. 6 S., R. 9 E., B.M. Sec. 11, SW¼ Sec. 14, N½NW¼, SW¼NW¼, NW¼SW¼
Peggy M. Axelsen	T. 6 S., R. 9 E., B.M. Sec. 2, NW¼SW¼, S½SW¼ Sec. 11, NW¼

Charlene R. Baltzor	T. 6 S., R. 9 E., B.M. Sec. 10, W½
George R. Baltzor	T. 6 S., R. 9 E., B.M. Sec. 10, E½
G. Patrick Morris	T. 6 S., R. 9 E., B.M. Sec. 8, S½
The heirs and devisees of John E. Morris, deceased.	T. 6 S., R. 9 E., B.M. Sec. 15, N½
Juanita M. Morris	T. 6 S., R. 9 E., B.M. Sec. 3, S½
Nellie Mae Morris	T. 6 S., R. 9 E., B.M. Sec. 3, Lots 2, 3, 4, S½N½
Elise L. Neeley	T. 6 S., R. 9 E., B.M. Sec. 8, E½NE¼ Sec. 9, W½NW¼ Sec. 15, SW¼
Vera M. Baltzor	T. 6 S., R. 9 E., B.M. Sec. 9, S½
Joan E. Roth	T. 6 S., R. 9 E., B.M. Sec. 4, Lots 1, 2, 3, 4, S½N½
Lyle D. Roth	T. 6 S., R. 9 E., B.M. Sec. 4, SE¼ Sec. 9, NE¼

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, if the Plaintiffs shall fail to submit satisfactory proof to this Court that they have divested themselves of the disqualifying assignments on or before May 1, 1977, the desert land entries shall be canceled as directed by the Interior Board of Land Appeals in its Decision of April 7, 1975, and the lands therein and the monies paid therefor shall be forfeited to the United States of America.

Dated this 20th day of December, 1976.

J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

G. PATRICK MORRIS, et al.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

Civil No. 1-75-74

MEMORANDUM AND ORDER OF DISMISSAL

In this suit to review a decision of the Interior Board of Land Appeals and to compel issuance of patents pursuant to the Desert Land Entry Act, 43 USC § 321, *et seq.*, the plaintiffs have moved this court to consider issues which they claim remain for adjudication following the decision of the United States Court of Appeals for the Ninth Circuit in *Morris v. Andrus*, 593 F. 2d 851 (9th Cir.). *cert. denied*, _____ U.S. _____ (1979), or, in the alternative, to find that the Court of Appeals lacked jurisdiction over the appeal and, therefore, that the case may be heard anew. This court finds that the judgment of this court dated December 20, 1976, constituted a final appealable order in this matter. It is further found that the decision of the Ninth Circuit in *Morris v. Andrus, supra*, fully disposed of the merits of this case. Accordingly, the decisions of the Interior Board of Land Appeals and of the Secretary of the Interior are affirmed and plaintiffs' complaint is dismissed with prejudice.

I. BACKGROUND

On May 16, 1975, the plaintiffs filed their complaint in the United States District Court, District of Idaho, which in essence challenged a decision of the Interior Board of Land Appeals denying their application for patents to be issued under the Desert Land Entry Act. The complaint, phrased in eight counts, alleged the following grounds for relief:

1). The decision of the IBLA was "arbitrary and capricious;

2). The IBLA failed to follow appropriate Administrative Procedure Act guidelines in formulating its interpretation of the Desert Land Entry Act;

3). The Desert Land Entry Act did not authorize cancellation of a patent under these circumstances;

4). The decision of the IBLA was not supported by substantial evidence;

5). The Department of the Interior was estopped from asserting the invalidity of the leases;

6). Plaintiff Sailor Creek Water Company was deprived of property without due process;

7). Morris and other plaintiffs were deprived of property without due process; and

8). The actions of the Department of the Interior amounted to a breach of its contract with the plaintiffs to issue the patents.

The plaintiffs prayed for declaratory relief declaring their entries to be valid, the entry of an order requir-

ing the Secretary of the Interior to issue the patents, and for such damages as would be proven at trial.

Upon the parties' cross-motions for summary judgment, this court entered the December 20 judgment whereby the plaintiffs' assignment to the Sailor Creek Water Company were declared invalid, and the plaintiffs were given until May 1, 1977, to divest themselves of the offending assignments or suffer forfeiture of their entires.

On appeal and cross-appeal, the Ninth Circuit affirmed that judgment insofar as it declared the assignment to be illegal under the Desert Land Entry Act, but reversed the provision whereby the plaintiffs could avoid forfeiture by divesting themselves of the assignments. The panel concluded that a finding of illegality precluded any further action, and left this court with no choice but to affirm the decision of the IBLA and approve the forfeiture. The Court of Appeals explicitly refused to remand to this court for any further consideration. The Supreme Court of the United States denied certiorari.

In returning to this court for relief, plaintiffs now argue that the December 20 judgment was not a final appealable order for two reasons. They first contend that the judgment failed to address all of the alleged claims for relief, and did not dispose of the entire complaint. In the alternative, the plaintiffs characterize the judgment as not being "final" in the sense that it contemplated further action in order to effectuate the decree.

II. DISCUSSION

A. Multiple Claims

In arguing that the December 20 judgment did not adequately dispose of all counts of the complaint, plaintiffs are, in effect, arguing that certification of the judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure was necessary in order to render the judgment appealable. On the cross-motions for summary judgment, plaintiffs argued the questions of the proper interpretation of "hold" in 43 USC § 329, the validity of the IBLA's alleged change in policy under the Administrative Procedure Act, and estoppel. The government addressed the issues of substantial evidence, the interpretation of § 324, and estoppel. Each side spent the bulk of its time arguing the § 324 issue.

This was not truly a case of multiple claims requiring certification under Rule 54(b). This was, rather, a case of a single claim for relief based upon alternative legal theories, and, as such, was not ripe for 54(b) treatment. *See CMAX, Inc. v. Drewry Photocolor Corp.*, 295 F. 2d 695 (9th Cir. 1961); *cf. Purdy Mobile Homes v. Champion Home Builders*, 594 F. 2d 1313 (9th Cir. 1979), *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F. 2d 691 (9th Cir. 1978). Plaintiffs alleged essentially one set of facts giving rise to their respective claims for relief. The basis of the claim was the Secretary's refusal to issue the patents. That claim was expressed in a variety of legal theories, each of which was merely a variation in the central theme.

The issue of multiple counts thus boils down to whether the judgment adequately disposed of each of the alternative theories. The interpretation of the word "hold" in § 329 was certainly critical to the plaintiffs' probable success on each theory. A finding that the IBLA had properly interpreted the Act would preclude a finding for plaintiffs on the "arbitrary and capricious" issue, the statutory interpretation contention, and the due process and central claim question. In the judgment, this court found for the plaintiffs on the estoppel issue, only to be reversed by the Ninth Circuit. The Administrative Procedure Act issue was briefed before this court and the Ninth Circuit. While the judgment did not mention the APA issue explicitly, it could be construed as finding implicitly for the defendants as to that count, and this court now so construes it. The judgment itself resolved the merits of the controversy completely, albeit in a manner which the appellate court later found to be improper.

In addition, it should be noted that the parties have treated the Desert Land Entry Act issue as dispositive for the entirety of this litigation up until the decision of the Ninth Circuit. All the parties and the trial court treated the December 20 judgment as being final on all issues raised by the summary judgment, and cross-summary judgment motions. It was treated as presenting only an issue of law and was based on the administrative record. At no time did the plaintiffs seek discovery on their various legal theories, and they did not request of this court any additional time to muster a factual showing either in support of their

own motion nor in opposition to the government's motion for summary judgment.

B. Finality of the Judgment

Plaintiffs also contend that the provision of the December 20 judgment allowing them until May 1 to divest themselves of the assignments violated the finality of judgment rule under 28 USC § 1291. The judgment clearly met the requirement of finality. The controversy as between the parties was fully resolved, leaving only the ministerial act of issuing the patents to follow if the plaintiffs met the divestiture condition. Under the so-called *Forgay-Conrad* rule, *Forgay v. Conrad*, 6 How. 201, 12 L.Ed. 404 (1848), the remaining ministerial act did not serve to make the judgment interlocutory and non-appealable. The rationale of appealability under *Forgay-Conrad* is the likelihood of irreparable harm to the parties if immediate review is not allowed. *See Weingartner v. Union Oil Company of California*, 431 F. 2d 26, 29 (9th Cir.), *cert. denied*, 400 U.S. 1000, 91 S.Ct. 459, 27 L.Ed. 2d 451 (1970). In this case, irreparable harm would have been done to the plaintiffs without immediate review. At best, they would have been forced to divest themselves of potentially lucrative lease assignments. At worst, they would have forfeited their patent rights completely. Accordingly, this court finds that the judgment was final and immediately appealable.

III. CONCLUSION

The Court of Appeals had jurisdiction over this case. In the absence of a remand or other explicit

direction from that court, the trial court is without authority to proceed any further.

An appropriate judgment will be entered forthwith.

DATED this 23rd day of June, 1980.

J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

G. PATRICK MORRIS, et al.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

Civil No. 1-75-74
JUDGMENT

A memorandum decision ordering entry of final judgment and dismissal of the plaintiffs' action with prejudice having been filed this date, and pursuant to the decision and mandate of the United States Court of Appeals for the Ninth Circuit,

IT IS HEREBY ORDERED:

1. That the decisions of the Interior Board of Land Appeals and of the Secretary of the Interior are AFFIRMED.

2. That plaintiffs' action is DISMISSED with prejudice.

3. That plaintiffs' motion to now amend the complaint is DENIED.

DATED at Boise, Idaho, this 23rd day of June, 1980.

J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

G. PATRICK MORRIS, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, and CECIL D. ANDRUS, Secretary of the Interior of the United States of America,
Defendants.

Civil No. 1-75-74
ORDER

This Court has thoroughly, and with understandable sympathy, given careful review and consideration to the several motions and the supporting and opposing briefs filed by the parties subsequent to this Court's order and judgment of June 23, 1980.

It must be kept in mind, as Judge Goodwin so clearly pointed out in his Court of Appeals opinion of November 16, 1978, this is a proceeding seeking review of a final administrative determination by the IBLA that the desert entries were subject to cancellation. It is not a separate and independent case wherein there is sought to be asserted causes of action at law or in equity against the United States and the officers of The Department of Interior.

This Court remains of the view that the Court of Appeals fully disposed of all of the issues properly before

this court in this administrative review proceeding and that no issues remain for consideration in this court. The "law of case" doctrine precludes further consideration.

There is no need to rule on the government's motion to strike the belated affidavit of G. Patrick Morris. It suffices to assure the government that the affidavit was not considered in reaching this decision.

The plaintiffs' alternative motion seeking to vacate this Court's judgment of June 23, 1980, and for an order permitting the plaintiffs to file an appropriate motion with the Court of Appeals requesting that supervening authority be applied to this case is DENIED. It is unnecessary and inappropriate for this Court to enter such an order. Plaintiffs are free to file an appropriate motion to recall the Court of Appeals mandate even at this late date. See *Verrilli v. City of Concord*, 557 F. 2d 664 (9th Cir. 1977). This court expresses no opinion on the merits of such a motion.

The order and judgment of this Court entered herein on June 23, 1980, are hereby CONFIRMED.

Dated at Boise, Idaho, this 9th day of October, 1980.

J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

APPENDIX J
UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

G. PATRICK MORRIS, et al.,
Appellees,

vs.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America,
Appellant.

No. 77-1914
77-1948

G. PATRICK MORRIS, et al.,
Appellants,

vs.

CECIL D. ANDRUS, Secretary of the Interior of the United States,
Appellee.

DC CV 1-75-74 JBA

APPEAL from the United States District Court for the District of Idaho (Boise).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered November 16, 1978.

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

G. PATRICK MORRIS, et al,
Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA, and JAMES G. WATT, Secretary of the Interior of the United States of America.
Defendants-Appellees.

No. 80-3506
DC CV 1-75-74 JBA

APPEAL from the United States District Court for the District of IDAHO (Boise).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of IDAHO (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 5, 1982.

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

G. PATRICK MORRIS, et al.,
Plaintiffs-Appellants,
vs.
THE UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

No. 80-3506
ORDER

Before: KENNEDY, FARRIS, and MORRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing, Judges Kennedy, Farris, and Morris have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Filed and entered April 16, 1982.

APPENDIX M

CONSTITUTION, STATUTORY PROVISIONS, AND REGULATIONS INVOLVED

CONSTITUTION: DUE PROCESS CLAUSE:

The pertinent portion of the Due Process Clause of the United States Constitution — Amendment 5, reads as follows: "No person shall *** be deprived of *** property, without due process of law;***"

STATUTORY PROVISIONS

The pertinent statutory provisions are the following:

5 U.S.C. § 552 (a) (1) provides in pertinent part as follows:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the

Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

5 U.S.C. § 553(b-(d) provide as follows:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the findings and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. §§554(a) and (b) provide in pertinent part as follows:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing***

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

***

(3) the matters of fact and law asserted."

5 U.S.C. §§ 556(a), (d) and (e) provide in pertinent part follows:

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

***

(d)***A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. ***

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title***

5 U.S.C. § 557(c) provides in pertinent part as follows:

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

5 U.S.C. §§ 558(a) and (b) provide as follows:

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

43 U.S.C. § 321 provides in pertinent part as follows:

It shall be lawful for any citizen of the United States, or any person of requisite age who may be entitled to become a citizen, and who has filed his declaration to become such and upon payment of twenty five cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter: ***At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under this Act

The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres.

43 U.S.C. § 324 provides as follows:

From and after the date of passage of this Act no assignment of an entry made under said Acts shall be

allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said Acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

43 U.S.C. § 329 provides as follows:

At any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act: Provided, however, that additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States.

43 U.S.C. § 1201 provides as follows:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

REGULATIONS:

The pertinent regulations of the Department of the Interior are the following:

43 C.F.R. §§ 232.18(a) and (d) (1963) provide in pertinent part as follows:

(a) After final proof and payment have been made the land may be sold and conveyed to another person without the approval of the Bureau of Land Management, but all such conveyances are nevertheless subject to the superior rights of the United States, and the title so obtained would fall if it should be finally determined that the entry was illegal or that the entryman had failed to comply with the law.

***

(d) A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereon and not as a conveyance thereof. The purchaser at a sale had for the foreclosure of such mortgage may be recognized as assignee upon furnishing proof of his qualifications to take a desert-land entry by assignment. Transferees, after final proof, mortgagees, or other

encumbrancers may file in the proper land office written notice stating the nature of their claims, and they will thereupon become entitled to receive notice of any action taken by the Bureau of Land Management with reference to the entry.

43 C.F.R. § 1852.1(a)(4) (1964) provides in pertinent part as follows:

(a) *Contents of complaint.* The complaint shall contain the following information, ***

(4) A statement in clear and concise language of the facts constituting the grounds of contest.

43 C.F.R. § 1852.1-5(a) provides in pertinent part as follows:

(a) *Summary dismissal; waiver of defect in service.* If a complaint when filed does not meet all the requirements of §§ 1852.1-4(a) and (c), or if the complaint is not served upon each contestee as required by this section, the complaint will be summarily dismissed by the manager and no answer need be filed.

43 C.F.R. § 1852.3-3 Notice of Hearing.

The examiner shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the bureau request or consent to an earlier date. The notice shall include (a) the time, place, and nature of the hearing, (b) the legal authority and jurisdiction under which the hearing is to be held, and (c) the matters of fact and law asserted.

43 C.F.R. § 2226.1-2(c)(3) Assignment

(3) No assignments of desert-land entries or parts of entries are conclusive until examined in the land office and found satisfactory and the assignment recognized. When recognized, however, the assignee takes the place of the assignor as effectively as though he had made the entry, and is subject to any requirement that may be made relative thereto. The assignment of a desert-land entry is one disqualified to acquire title under the desert-land law, and to whom, therefore, recognition of the assignment is refused by the manager, does not of itself render the entry fraudulent, but leaves the right thereto in the assignor. In such connection, however, see 42 L.D. 90 and 48 L.D. 519.

Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-235

In the Supreme Court of the United States

OCTOBER TERM, 1982

G. PATRICK MORRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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CAROL E. DINKINS
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QUESTIONS PRESENTED

1. Whether the court of appeals' prior decision in this case is the law of the case and decided most of the questions raised by petitioners.

2. Whether the district court properly refused to permit petitioners to amend their complaint following the denial of certiorari in the earlier appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. C-1 to C-3) is reported at 676 F. 2d 711. The district court's memorandum and order of dismissal (Pet. App. G-1 to G-7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1982, and a petition for rehearing was denied on April 16, 1982 (Pet. App. L-1). On July 7, 1982, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 16, 1982. The petition was filed on August 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In early 1963, petitioner G. Patrick Morris and 11 friends and relatives ("the entrymen") set out to develop 3,789.62 acres of desert land owned by the United States and located along the Snake River in Idaho. The entrymen obtained water permits from the State of Idaho and filed declarations with the Department of the Interior, pursuant to the Desert Land Act, 43 U.S.C. 321 *et seq.*, covering 12 adjacent 320-acre parcels of previously undeveloped public land. The entrymen then assigned the water permits to the Sailor Creek Water Company and entered into a series of lease, contract, and mortgage agreements with Sailor Creek. Under those agreements, Sailor Creek promised to construct an irrigation system for the 12 parcels, and the entrymen agreed to pay for the irrigation project, with payment to be secured solely by nonrecourse mortgages on each of the parcels. In addition, the other 11 entrymen leased their land to petitioner Morris who, in turn, arranged for Sailor Creek to lease all 12 entries for a total of 11 years. The rental was calculated to cover the entrymen's taxes and the payments for the irrigation system. The lease also provided that Sailor Creek was to exercise total control of the farming operations and to retain all revenue from those operations. Thus, Sailor Creek became both the mortgagee and lessee of more than 3,700 acres of public land (Pet. App. A-2, D-2 to D-15, D-30, E-5 to E-10).[1]

In 1966, after becoming aware of the arrangement between the entrymen and Sailor Creek, the Bureau of Land Management ("BLM") filed contests against the entries, alleging that the entrymen had unlawfully assigned

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[1]By 1965, Sailor Creek had completed the irrigation project and had installed farm equipment. Both the project and the equipment were primarily designed for farming the entire 12 parcels as one farm (Pet. App. D-11, F-3).

their interests to a corporation, in violation of 43 U.S.C. 324, and that the Sailor Creek project, which involved more than 3,700 acres, exceeded the 320-acre limitation contained in 43 U.S.C. 329. BLM accordingly sought cancellation and forfeiture of the entries (Pet. App. D-26, E-26).

Following an evidentiary hearing, the administrative law judge dismissed the complaints (Pet. App. D-21 to D-48). With regard to BLM's claim that the entrymen had unlawfully assigned their parcels to a corporation, the ALJ concluded that the lease-mortgage arrangements did not constitute assignments within the meaning of 43 U.S.C. 324. The ALJ further found that petitioners had not exceeded the 320-acre limit because Sailor Creek did not possess all of the rights of the entrymen.

The BLM appealed, and the Interior Board of Land Appeals ("IBLA") reversed. The IBLA found (Pet. App. E-10 to E-23) that Sailor Creek's possessory and legal interests under the lease-mortgage agreements constituted a "hold[ing] [of desert land] by assignment or otherwise" proscribed by 43 U.S.C. 329.[2] In addition, the IBLA held that the government was not estopped from seeking forfeiture of the entries, because petitioners had not relied upon any official action. The IBLA therefore ordered the entries cancelled (Pet. App. E-23 to E-27).

The entrymen then filed suit in the United States District Court for the District of Idaho seeking review of the IBLA decision. On cross-motions for summary judgment, the district court held that the arrangements between the entrymen and Sailor Creek were "holdings" prohibited by 43 U.S.C. 329 and that the lease-mortgage transactions

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[2]The IBLA strongly suggested (Pet. App. E-21) that the arrangements also constituted unlawful assignments in violation of Section 324.

constitued unlawful assignments within the meaning of 43 U.S.C. 324 (Pet. App. F-4 to F-6, F-15). However, the court reversed the portion of the IBLA decision requiring cancellation of the entries, terming that remedy "egregiously harsh under the circumstances of this case" (Pet. App. F-10). The court noted expenditures for improvement of the entries, as well as what it viewed as a change in the administrative interpretation of the relevant statutes and delay in the initiation of the contests (Pet. App. F-10 to F-12). The court therefore ordered the Secretary to issue the contested patents upon proof that Sailor Creek had divested itself of all impermissible interests in the entries (Pet. App. F-13, F-16).

Both sides appealed. Pet. App. A-1 to A-9; 593 F. 2d 851. Rejecting the entrymen's appeal, the court of appeals held that "the Sailor Creek scheme constituted an assignment within the meaning of § 324" and that "the consolidated interests amassed under the contracts and leases constituted a 'holding' in excess of 320 acres, in violation of § 329" (Pet. App. A-4). On the remedy issue, the court held that the Department of the Interior was not estopped from enforcing the provisions of the Desert Land Act even though it had not challenged the entries until the development work was complete. The court concluded that there was no basis for estoppel because the government had no knowledge of the terms of the contracts between the entrymen and Sailor Creek until after petitioners had completed their development scheme (Pet. App. A-4 to A-9).

The court subsequently denied a petition for rehearing (Pet. App. B-1 to B-2) and this Court denied a petition for a writ of certiorari. 444 U.S. 863 (1979).

Petitioners then moved the district court to consider certain issues allegedly not adjudicated on appeal or, in the alternative, to find that the court of appeals lacked jurisdiction to entertain the appeal and that its decision was

therefore void (Pet. App. G-1). In addition, petitioners sought leave to amend their complaint by adding 11 new counts.[3]

The district court denied petitioners' motion to amend, affirmed the IBLA's decision, and dismissed the entrymen's action (Pet. App. H-1). The court held that its previous decision was a final order appealable under 28 U.S.C. 1291 (Pet. App. G-4 to G-7). Rejecting the argument that the order had failed to dispose of all of petitioners' claims, the court observed (*id.* at G-4):

> This was not truly a case of multiple claims requiring certification under [Fed. R. Civ. P.] 54(b). This was, rather, a case of a single claim for relief based upon

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[3]Those counts alleged (80-3506 Excerpts of Record 59-65 ("R.")), among other things, that the cancellation of the desert land entries violated their right to equal protection and due process of law (ninth count) (R. 59); that the administrative complaints and notice of hearing were insufficient (tenth count) (R. 60); that the IBLA failed to consider and rule upon certain issues raised in the administrative proceedings (eleventh count) (R. 60); that IBLA's failure to consider and rule upon every issue violated due process (twelfth count) (R. 61); that if the transaction between the entrymen and Sailor Creek constituted excess holdings under 43 U.S.C. 329, the proper remedy was an injunction and/or damages and that the IBLA lacked jurisdiction to cancel the entries (thirteenth count) (R. 61); that the administrative proceedings violated the Administrative Procedure Act and departmental regulations and that IBLA's decision was void for lack of jurisdiction (fourteenth count) (R. 61-62); that the provisions of 43 U.S.C. 329 "as interpreted by the IBLA and as applied to the facts of this case, are unconstitutionally vague" (fifteenth count) (R. 62); that respondents were "impermissibly prejudiced" against the entrymen and thus denied them due process (sixteenth count) (R. 62-63); that the Department of the Interior's combination of policymaking, prosecutorial, and administrative functions violated due process (seventeenth count) (R. 63); that the Department of the Interior was barred by laches from prosecuting the administrative proceedings and cancelling the entries (eighteenth count) (R. 63-64); and that by accepting the purchase price for each entry the United States had waived the right to cancel any of the entries for violation of the Desert Land Act (nineteenth count) (R. 64).

> alternative legal theories, and, as such, was not ripe for 54(b) treatment.

The court also rejected petitioners' contention that the order was not final due to the provision allowing them several months to divest themselves of the illegal assignments (Pet. App. G-4 to G-6).

The court denied petitioners' subsequent motions to vacate its order of June 23, 1980 (Pet. App. H-1), and petitioners appealed. The court of appeals affirmed (Pet. App. C-1 to C-3), holding that its previous decision was the law of the case. The court stated (Pet. App. C-3):

> Appellants' briefs in the instant appeal and their motion to amend their complaint after the remand do not appear to state any issues substantially different from those raised in appellants' briefs and petition for rehearing in the previous appeal, and they certainly fail to allege any issues not decided by necessary implication in our prior judgment.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners seek review of numerous questions that were decided in their earlier appeal. As the court of appeals correctly held (Pet. App. C-2), however, "[i]ssues decided on appeal, either expressly or by necessary implication, are generally binding on remand and on a subsequent appeal." See, *e.g.*, *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F. 2d 1059, 1061-1062 (5th Cir. 1981); *Todd & Co.* v. *SEC*, 637 F. 2d 154, 157 (3d Cir. 1980); 1B J. Moore & T. Currier, *Moore's Federal Practice* para. 0.404[10], at 573 (2d ed. 1982).

As previously noted, the earlier appeal in this case arose when both sides challenged a district court decision holding, first, that Sailor Creek held more than 320 acres of desert entry land, in violation of 43 U.S.C. 329; second, that petitioners had assigned their entries, in violation of 43 U.S.C. 324; and third, that the entries should be cancelled only if petitioners did not divest themselves of the disqualifying assignments within a period specified by the court (see Pet. App. F-14 to F-18).

The court of appeals agreed with the district court that Sailor Creek's holding violated 43 U.S.C. 329 and that the entrymen had assigned their entries, in contravention of 43 U.S.C. 324 (Pet. App. A-4). However, the court of appeals held that the portion of the IBLA decision ordering outright cancellation of the entries should have been sustained (Pet. App. A-5 to A-9).

At least six of the ten questions now raised by petitioners were decided either expressly or by implication in the earlier appeal, and petitioners raised those same questions or nearly identical ones in their earlier, unsuccessful petition for a writ of certiorari.

In the first appeal, the court of appeals expressly decided petitioners' present question four, *i.e.*, "[w]hether the leases and mortgages violated the holding limitation of 43 U.S.C. § 329" (Pet. i). In their previous petition, petitioners raised a virtually identical question (79-7 Pet. 2): "Do a mortgage and a sublease (or a lease) constitute the holding of the lands in a desert land entry within the meaning of 43 U.S.C. § 329?" In the first appeal the court of appeals decided these questions when it stated that "the consolidated interests amassed under the contracts and leases constituted a 'holding' in excess of 320 acres, in violation of § 329" (Pet. App. A-4).

The court of appeals' first opinion decided petitioners' present question five in equally plain language. Petitioners state that question as follows (Pet. i): "Whether violation of the holding limitation of § 329 is ground for cancellation of the entries." Several questions presented in petitioners' earlier petition also challenged the government's right to cancel the entries based upon 43 U.S.C. 329.[4] The court of appeals decided this issue in the first appeal, stating (Pet. App. A-4):

> The statute states that "no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than" 320 acres of land, and provides for contesting and cancellation. 43 U.S.C. § 329.

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[4]The questions stated (79-7 Pet. 2, 4):

> 3. Does the holding by a single entity, by assignment or otherwise, of more than 320 acres of desert entry land, warrant or require forfeiture of all land thus held, and all moneys paid for that land, where the transactions were voluntarily submitted to the Bureau of Land Management nearly 22 months before the entries were challenged?
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> • • • • •
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> 5. Did the Interior Board of Land Appeals abuse its discretion or exceed its powers and authority by cancelling the desert land entries on the basis of a new and different interpretation of 43 U.S.C. § 329 adopted by the Secretary of the Interior 22 months or more after the entrymen made final proof and final payment for the land?
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> • • • • •
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> 11. Did the right to patent vest in the entrymen upon making final proof and final payment under 43 U.S.C. § 329, so as to preclude the Department of the Interior from thereafter cancelling the entries on the basis of limitations, requirements or procedures not stated in regulations or decisions which were in effect when final proof and final payment were made?

The court of appeals' first decision necessarily decided petitioners' present question six, *i.e.*, "[w]hether the IBLA's interpretation of 43 U.S.C. § 329 can be applied to these entries" (Pet. i). The court agreed with that interpretation, and held that the IBLA had not erred in applying it in this case (see Pet. App. A-7 to A-9). Again, essentially the same question was raised in the earlier petition.[5]

The court of appeals also implicitly decided petitioners' question seven, *i.e.*, "[w]hether the IBLA's decision [was] supported by substantial evidence" (Pet. i). The court approved the trial court's parallel findings that petitioners had "assigned" their entries and that Sailor Creek held more than 320 acres of desert land (*id.* at A-4). The court also approved the IBLA's finding that " '[t]he Government was not informed of the terms of the lease agreement until after it made a specific request for the information' " (Pet. App. A-6; see also Pet. App. A-7 to A-8). Thus, the court of appeals clearly sustained all the findings upon which the IBLA's decision rested.[6] The earlier petition in this case raised a virtually identical question.[7]

Petitioners raise the question "[w]hether the courts below had jurisdiction to decide the assignment issue" (Pet. i, question two). The same question was raised in the earlier

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[5]Question five in the earlier petition is quoted in note 4, *supra*.

[6]Moreover, the court of appeals agreed with the district court except with respect to the issue of remedy, and the district court had held (Pet. App. F-5) that except with regard to that question "[t]he interpretation and analysis undertaken by the IBLA is supported by substantial evidence."

[7]The prior petition raised the question (79-7 Pet. 3):

> 7. Is the Interior Board of Land Appeals' finding that the Bureau of Land Management was not aware that the entrymen intended to lease their entries to a single farming entity supported by substantial evidence?

petition,[8] and it is clear that the court of appeals decided it in the first appeal. Since that court decided the assignment issue (Pet. App. A-4), it necessarily held that the issue was properly before it.

Finally, the court of appeals implicitly rejected respondents' argument that "[t]he administrative charges failed to provide adequate notice of the matters of fact and law asserted, and were [therefore] insufficient to confer jurisdiction of the administrative proceedings" (Pet. 12; see Pet. i, question one). This same contention was advanced in the previous petition, where petitioners raised the question (79-7 Pet. 5, question fifteen): "Should the administrative contests have been dismissed because of the BLM's failure to state in the administrative complaints the matters of fact and law asserted?"[9] Even if the administrative charges had been defective (and they plainly were not),[10] petitioners had

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[8]In any event, petitioners' claim (Pet. 14) that the district court lacked "jurisdiction" to interpret or apply 43 U.S.C. 324 is absurd. Petitioners' own complaint alleged (count 1, para. VI): "The Decision of the [IBLA] is based on an erroneous interpretation of the Desert Land Act, and particularly 43 U.S.C. * * * 324" (R. 6).

[9]The earlier petition raised the question (79-7 Pet. 2):

> 4. Can the administrative decision cancelling the desert land entries be upheld, on judicial review, on a finding by the District Court and by the Court of Appeals that the entries had been assigned, where the Interior Board of Land Appeals made no such finding and did not reverse the Administrative Law Judge's finding that the entries had not been assigned?

[10]Petitioners assert (Pet. 15) that the administrative complaints were defective because they "did not state that the mortgages and leases, in combination, constituted a holding under 43 U.S.C. § 329, or that the activities of Sailor Creek constituted such possession and control and the receipt of such benefits as to constitute a holding under § 329." However, the complaints unambiguously alleged (Pet. App. E-4):

> The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of * * * 43 U.S.C. sec. 329.

full notice of the nature of the charges when the case was before the IBLA, and as the court of appeals noted, "the IBLA has all the powers on appeal of the initial decision which it would have had in making the initial decision itself" (Pet. App. A-8).

2. Petitioners contend (Pet. 12-13) that the court of appeals' earlier decision is not the law of the case because the district court order from which the appeal was taken was not "final" within the meaning of 28 U.S.C. 1291. Petitioners themselves appealed the same order under 28 U.S.C. 1291 and did not raise the issue of appellate jurisdiction either in the court of appeals or in their petition for a writ of certiorari. In any event, petitioners' jurisdictional arguments clearly lack merit.

Noting that the district court order provided for cancellation of the entries only if petitioners did not divest themselves of the disqualifying assignments (Pet. App. F-18), petitioners first claim (Pet. 12) that the order was not final because it "reserved jurisdiction to rule on the adequacy of the divestiture documents." However, it has long been settled that an order is final for purposes of appeal where it directs the immediate delivery of physical property but leaves certain ministerial tasks, such as an accounting, undone and where immediate execution of the order threatens hardship to the party required to relinquish the property. See, *e.g.*, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67-72 (1948); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 125-126 (1945); *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848); *Sekaquaptewa* v. *MacDonald*, 575 F. 2d 239, 243 (9th Cir. 1978). The district court order here fell within that category. If petitioners had been required to complete divestiture before an appeal could be taken, they could not have easily regained their entries had they prevailed on appeal.

Petitioners also claim (Pet. 12) that the district court order was not final because it did not dispose of their claim for damages. But since the district court ruled against petitioners on the issue of liability (by holding that 43 U.S.C. 324 and 329 had been violated and that divestiture of the assignments was required), the court obviously did not have to address the question whether damages should be awarded in petitioners' favor.

Furthermore, even if the district court's order was not final, it was nevertheless an order "granting" and "refusing" an injunction and was accordingly appealable under 28 U.S.C. 1292(a)(1). Petitioners' complaint sought an injunction unconditionally "[r]equiring the Secretary of the Interior to issue and deliver to the individual [petitioners] patents for the conveyance of title to the lands in their respective entries". The district court ordered issuance of the patents on the condition that petitioners effectively divest themselves of the unlawful assignments (Pet. App. F-16). Thus, both sides could appeal that order under 28 U.S.C. 1292(a)(1).[11]

3. Petitioners assert (see Pet. i, question eight) that the district court erred by denying them leave to amend their complaint after summary judgment on their original claims had been granted in favor of the government and affirmed on appeal. Petitioners also seek review of several of the questions raised in their proposed amended complaint (see Pet. i, questions nine and ten).

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[11]Moreover, even if the court of appeals lacked jurisdiction to entertain the first appeal, there is no reason to believe that the court would have decided any issue differently if it had been required to consider the issues afresh in the second appeal. On both occasions, petitioners' suggestion for rehearing en banc was denied without a single judge requesting a vote on the suggestion. Similarly, this Court previously denied review of the six issues discussed above, and those issues do not merit further review now any more than they did then.

"Where, although given an opportunity to amend, the pleader has stood upon his pleading and appealed from a judgment of dismissal, he will not ordinarily be able to amend either in the appellate court, or in the trial court if the order of dismissal is affirmed, unless the mandate of the appellate court expressly permits such amendment." 3 J. Moore, *Moore's Federal Practice* para. 15.11, at 15-147 (2d ed. 1982). See also *Prescription Plan Service Corp.* v. *Franco*, 552 F. 2d 493 (2d Cir. 1977); *United States Fidelity & Guaranty Co.* v. *Perkins*, 388 F. 2d 771 (10th Cir. 1968). Here, permitting the requested amendments would have been inconsistent with the court of appeals' mandate. As the court stated (Pet. App. C-3): "There being no ambiguity or flexibility in the decision of this court in the prior appeal, * * * the district court properly interpreted that opinion as requiring entry of judgment for the United States."

Moreover, even if the court of appeals' mandate did not preclude the proposed amendments, the district court did not err in refusing to permit them. Where, as here, a responsive pleading is served before the motion to amend is filed, the question whether to permit amendment of a complaint without the other party's consent is committed to the sound discretion of the trial judge. Fed. R. Civ. P. 15(a); *Daly* v. *Sprague*, 675 F. 2d 716, 723 (5th Cir. 1982); *Neighborhood Development Corp.* v. *Advisory Council on Historic Preservation*, 632 F. 2d 21, 25 (6th Cir. 1980). In this case, the trial judge plainly did not abuse his discretion, since respondents merely sought to relitigate issues that were not "substantially different from those raised in appellants' briefs and petition for rehearing in the previous appeal" (Pet. App. C-3). Petitioners' "undue delay, bad faith [and] dilatory motive," and the "futility of amendment[s]" (*Foman* v. *Davis*, 371 U.S. 178, 182 (1962)) fully justified the court's ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-235

In The Supreme Court of the United States

October Term, 1982

G. PATRICK MORRIS, er al,

Petitioners,

-vs-

UNITED STATES OF AMERICA and JAMES G. WATT, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

The arguments advanced by the respondents serve to emphasize that the decision of the Court of Appeals conflicts with decisions of this Court, and that it should be reversed.

I

This Court's refusal to review the case following the first appeal imported "no expression of opinion on the merits." *Sunal vs. Large,* 332 U.S. 174, 181 (1947); *Polites vs. United States,* 364 U.S. 426, 433, n9 (1960).

Even though this Court denied Petitioners' Petition for a Writ of Certiorari following the first appeal, this Court now may consider questions raised on the first appeal as well as those that were before the Court of Appeals upon the second appeal. *Mercer vs. Theriot,* 377 U.S. 152, 153-154 (1964); *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.,* 240 U.S. 251, 257 (1916); *Panama Railroad Co. vs. Napier Shipping Co.,* 166 U.S. 280, 284 (1897).

In their Brief in opposition to the earlier Petition for a Writ of Certiorari, No. 79-7, the respondents did not challenge the petitioners' assertion that several issues were left undecided by the opinion of the Court of Appeals in the first appeal.

It is obvious from a comparison of the 1976 decision of the District Court (Pet. App. F), and the opinions of the Court of Appeals (Pet. App. A, B and C), with the allegations of the Complaint (R

1-12) and the allegations the petitioners sought to add by amendment (R 59-65), that many issues were not considered at all by the District Court or by the Court of Appeals and that there has been no "application of the judicial mind to the precise question(s) necessary to be determined to fix the rights of the parties." *St. Louis, V. & T.H.R. Co. vs. Terra Haute & I.R. Co.*, 145 U.S. 293 (1892), citing *Carroll vs. Carroll*, 57 U.S. 128, 136, 16 How. 275, 287.

The relief fashioned by the District Court in its 1976 Judgment, coupled with the petitioners' willingness to file the instruments of divestiture, made it unnecessary for the District Court to consider any issues other than estoppel and 5 U.S.C. § 552. The usurpation by the Court of Appeals of the District Court's authority and duty to deal with the other issues in the first instance, upon reversal on the first appeal, constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by issuing a Writ of Certiorari. U.S. Supreme Court Rule 17.1(a); *Firestone Tire & Rubber Co. vs. Risjord*, 449 U.S. 368, 374 (1981).

The numerous issues that were not mentioned in the opinion and were not addressed by either the District Court or the Court of Appeals directly, at least in their present form, require that the case be remanded to the District Court for consideration of the issues not addressed by the District Court and the Court of Appeals. *Cf., G.D. Searle & Co. vs. Cohn*, 455 U.S. ____, (No. 80-644, Feb. 24, 1982, Slip Op. 9-10).

"***Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano vs. Sanders*, 430 U.S. 99, 109 (1977). The administrative record in this case was not a sufficient basis for resolution of factual questions involved in the constitutional issues. The respondents did not present affidavits or other evidence to show that there was no genuine issue with respect to any material fact involved in any of the constitutional issues. The record before the District Court and before the Court of Appeals was inadequate for resolution of the constitutional issues. Among the numerous constitutional issues is the question of whether the issuance of patents for other desert land entries that were developed under similar arrangements, while declaring these entries invalid, violates the equal protection aspect of the due process clause of the United States Constitution. These constitutional issues could not have been properly resolved by either the District Court or the Court of Appeals, and the case should be remanded to the District Court for full consideration of those issues.

II

Respondent's claim (Br. in Opp. 11) that the Court of Appeals had jurisdiction of the first appeal because the petitioners appealed from the 1976 Judgment and did not raise the issue of appellate jurisdiction in the Court of Appeals or in their Petition for a Writ of Certiorari is without merit.

Neither the action of the Court of Appeals nor the consent of the parties can confer jurisdiction, and the jurisdictional requirements cannot be waived. *443 Cans of Frozen Egg Product vs. United States*, 226 U.S. 172, 184 (1912).

Respondents' reliance upon *Republic Natural Gas Co. vs. Oklahoma*, 334 U.S. 62 (1948), and other cases (Br. in Opp. 11) is misplaced. None of the cited cases hold that the threat of hardship to one party makes an order final for purposes of an appeal by the opposing party.

Respondents also are mistaken in their analysis of the District Court's 1976 Judgment. That Judgment did not require the petitioners to divest themselves of their desert land entries, it merely required them to divest themselves of the agreements that the IBLA interpreted as constituting violations of the holding limitation of 43 U.S.C. § 329. By their compliance with the divestiture provision of the 1976 Judgment, the petitioners were entitled to retain their entries, and there simply was no issue of difficulty in regaining their entries, as suggested by the respondents (Br. in Opp. 11).

The respondents are wrong in their assertion that the District Court ruled against the petitioners on the issue of liability. Until the District Court actually rules that its findings and rulings on the holding issue and on the assignment issue prelude an award of damages to the petitioners, that issue remains undecided. Furthermore, the District Court's estoppel ruling was sufficient ground to prevent applica-

tion of the IBLA's interpretation of § 329, and there is no basis in the record for inferring that the District Court intended its ruling to preclude liability for damages.

Respondents now assert (Br. in Opp. 12) that the Court of Appeals had jurisdiction of the first appeal under 28 U.S.C. § 1292 (a)(1), but in the Court of Appeals the respondents asserted that jurisdiction rested on 28 U.S.C. § 1291[1], and § 1292 (a)(1) was never mentioned. Furthermore, the District Court's 1976 order did not grant an injunction, it granted relief in the nature of mandamus, requiring the performance of a ministerial act wrongfully withheld by the Secretary of the Interior. Therefore § 1292(a)(1) is not applicable to the 1976 Judgment.

III

This case is not, as asserted by the respondents, one in which the petitioners have stood by their pleading and appealed from a Judgment of Dismissal. The District Court's 1976 Judgment was not one of dismissal, but one which granted relief to the petitioners on the basis of their Complaint.

If the opinion of the Court of Appeals in the first appeal is given the effect sought by the respondents (Br. in Opp. 13) and granted by the Court in Appeals in the second appeal, the result is but another example of unauthorized usurpation of the authority and duties of the District Court requiring the exer-

[1]Brief for the United States, Appellee, Cross-Apellant 1, 9th Cir. No. 77-1914.

cise of this Court's power of supervision under Rule 17. In view of the favorable nature of the 1976 Judgment, it would have been a waste of the District Court's time for the petitioners at that time to file their Motion for Leave to Amend Complaint. Nothing in the realm of judicial efficiency required or authorized the Court of Appeals to issue an opinion effectively denying all opportunity to amend the Complaint, when there was no motion to amend before the Court and the necessity for amending the Complaint was not apparent to any of the parties.

There was no finding by the District Court that the petitioners' Motion for Leave to Amend Complaint was unduly delayed, made in bad faith or with dilatory motive, or was futile. The District Court denied that motion because it took the position that all the issues had been decided by the Court of Appeals on the first appeal (Pet. Apps. G and I). The necessity for seeking amendments to the Complaint did not become apparent until the mandate came down from the Court of Appeals following the first appeal and the respondents first made their claim that the opinion in the first appeal decided all the issues previously pleaded. Justice clearly requires that the petitioners have a full opportunity to present, and to have decided, all valid issues in the case.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted.

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